

ABOUT THE JOURNAL

The *Kansas Journal of Law & Public Policy* was conceived in 1990 as a tool for exploring how the law shapes public policy choices and how public policy choices shape the law. The *Journal* advances contemporary discourse on judicial decisions, legislation, and other legal and social issues. With its three published issues per year, the *Journal* promotes analytical and provocative articles written by students, professors, lawyers, scholars, and public officials.

The *Journal* fosters a broad notion of diversity in public policy debates and provides a forum for the discussion of public policy issues. The *Journal* endeavors to enable the policy-making process through the presentation of diverse treatment and critical analysis on significant policy matters. Our publication also aspires to serve a broad audience of decision-makers and the intellectually curious. We specifically target groups like legislators, judges, educators, and voters; each of which plays a valuable role in the legal process.

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The *Journal* invites well-written, well-researched articles on current issues that offer well-reasoned public policy arguments. The public policy argument must be central and clear. It is the express policy of the Editorial Board “to publish great articles, regardless of the source.”

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The *Journal* hosts an annual symposium at the University of Kansas School of Law. Speakers present articles and discuss an important public policy issue determined in advance by the Editorial Board. Articles submitted by symposium participants are published together in issue three of the *Journal*.

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Dear *Journal* Readers,

Welcome to the Symposium Issue of Volume XXXIV of the *Kansas Journal of Law & Public Policy*. This year's symposium, "Cities of Tomorrow: Legal Approaches to Urban Health and Sustainability," was held on February 28, 2025, in Lawrence, Kansas. The event featured scholars, policymakers, and practitioners who explored innovative legal and policy strategies aimed at building healthier, more sustainable cities. Topics ranged from environmental justice and climate change to housing, public transit, and the structural issues of race, class, and geography that shape urban development.

This issue features a collection of scholarly articles and edited transcripts from our six symposium presenters. Together, they offer legal frameworks, practical strategies, and critical perspectives for navigating the complex challenges cities face today and for reimagining urban life in the decades to come.

We begin with Professor Rebecca Bratspies of CUNY School of Law, whose article, *New York City as a Laboratory of Environmental Innovation*, highlights how New York City is leading by example through creative, place-based environmental strategies. Professor Bratspies examines three innovative projects: Renewable Rikers, the Daylighting of Tibbetts Brook, and a citywide building retrofit initiative under Local Law 97. Each initiative reimagines urban space to address environmental degradation, promote justice, and advance the city's ambitious climate goals. Her article positions cities as key agents in the global response to climate change.

Next, we present *The Mysterious Power of Land Use Law: Constructing a Framework Law for Climate Resilient Development*, by Professor John R. Nolon, Distinguished Professor of Law Emeritus at the Elisabeth Haub School of Law at Pace University, and Maureen Hartwell, Haub Law Class of 2025. This article examines Climate Resilient Development (CRD), a framework endorsed by the Intergovernmental Panel on Climate Change (IPCC), which integrates adaptation and mitigation efforts through land use law. It then proposes a responsive legal structure that empowers local governments to regulate and incentivize sustainable development,

offering a roadmap for policymakers to translate international climate goals into actionable local policies.

Our third contribution is a keynote transcript from Mayor Quinton Lucas of Kansas City, Missouri, titled *From 'Under Siege' to 'Under Construction': How Cities Thrive in Hostile Times*. Mayor Lucas shares a candid and insightful analysis of the legal and political challenges facing cities, including increasing state preemption. Drawing on both his scholarship and mayoral experience, he outlines a framework for municipal resilience and offers practical examples of how Kansas City is navigating and overcoming these challenges in real time.

The fourth piece is a transcript of a presentation by Professor Audrey McFarlane of the University of Baltimore School of Law, titled *Property Values: Accounting for Racial Valorization and Stigmatization in Development*. Professor McFarlane critically examines the intersections of race, wealth, and development. She challenges us to rethink how we talk about race in public policy and urban planning and argues that genuine equity in city-building demands a deeper and more honest reckoning with structural inequality.

We then turn to a transcript from Chris Allen, Director of Events and Partnerships at Strong Towns. In his talk, *Strong Towns: A Bottom-Up Revolution to Rebuild American Prosperity*, Allen critiques the post-war suburban development model and its lasting impacts on municipal budgets, infrastructure, and community life. He argues for a bottom-up approach rooted in local collaboration and financial resilience. His presentation offers both a diagnosis of the structural problems facing American cities and a compelling call to action for reform at the local level.

The final piece in this issue is an article by Professor Joel Mendez, an Assistant Professor of Urban Planning at the University of Kansas, and Ian D. Njuguna, a doctoral student at Arizona State University, titled *Towards Universal Access: Exploring the Role and Feasibility of Fare-Free Transit in the United States*. Their research explores how fare-free transit can enhance mobility for low-income and minority populations, who are often disproportionately burdened by limited transportation options. The authors frame fare-free transit as not only a tool for improving access to jobs, healthcare, and

education, but also as a strategy for advancing equity and social inclusion in urban environments.

Together, these contributions reflect the depth of knowledge, creativity, and commitment to change that our presenters brought to the symposium. From local governance and climate law to public transit and equitable development, each piece offers a valuable perspective on how legal and policy tools can help shape the cities we live in and improve them for the future. I hope this issue not only brings attention to the challenges facing urban communities today but also encourages thoughtful discussion and meaningful progress toward building more sustainable and equitable cities.

It has been a true privilege to serve as Symposium Editor for this issue. I am deeply grateful to the brilliant scholars and practitioners who contributed their work, and to the entire *Journal* team for their diligence, care, and commitment throughout this process. I also want to extend my sincere thanks to Professors Richard Levy and Corey Rayburn Yung for their ongoing support and mentorship as faculty advisors, as well as to Professors Uma Outka and Robin Craig for their thoughtful guidance during the symposium planning.

To those who joined us in Lawrence for the symposium, thank you for helping bring this conversation to life. And to those reading now, thank you for engaging with the ideas in these pages. I hope you find this issue to be informative, thought-provoking, and energizing as you continue your own work to build stronger, more resilient communities.

Leah Stein
Symposium Editor-in-Chief

NEW YORK CITY AS A LABORATORY OF ENVIRONMENTAL INNOVATION

By: Rebecca Bratspies*

The world is increasingly urban.¹ By 2050, the United Nations projects that more than two-thirds of global population will live in cities.² Urbanization is even more pronounced in the United States, where eighty percent of people live in urban areas,³ defined broadly. People move to these cities for a variety of reasons—urban settings provide economic and educational opportunity, and serve as hubs for technical, cultural, and social innovation.⁴ Indeed, in the United States, the twenty-five largest cities generate more than half of national GDP.⁵ New York City alone generates nearly nine percent of the United States' GDP,⁶ and were it a country, New York City would have the ninth largest GDP in the world.⁷

With large populations, significant resources, and varying degrees of legal authority, cities like New York City have become the focal point for many social, environmental, and economic struggles. But cities fit awkwardly into the United States legal systems. The federal constitution assigns certain powers to the federal government, reserving the rest to states.⁸ Cities are not mentioned.

Given that cities are sub-state entities, much like states are sub-national entities, the fifty states have created different approaches to structuring their cities.

* Professor, CUNY School of Law and Director Center for Urban Environmental Reform. Thank you to the organizers and participants of the *Kansas Journal of Law and Public Policy* 2025 Symposium: "Cities of Tomorrow: Legal Approaches to Urban Health and Sustainability." Special thanks to the student editors whose careful work greatly improved this essay.

¹ UNITED NATIONS, DEPT. ECON. AND SOC. AFFS., POPULATION DIVISION, *World Urbanization Prospects: The 2018 Revision*, U.N. Doc. ST/ESA/SER.A/420, at 9 (2019) (explaining that from 1950 to 2018, the share of global population living in urban areas nearly quintupled, with urban population growing at much faster rate than overall population growth).

² *Id.* at 10.

³ *Urban Area Facts*, U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/geography/guidance/geo-areas/urban-rural/ua-facts.html> [<https://perma.cc/NFL6-TNAD>].

⁴ See, e.g., Dallas Gislason, *How Cultural Diversity Makes a City a Better Place to Live, Work, and Play*, MEDIUM (Mar. 18, 2021), <https://dallasgislason.medium.com/how-cultural-diversity-makes-a-city-a-better-place-to-live-work-and-play-ab9080af853e> [<https://perma.cc/7GZM-DHQ2>] (making these points).

⁵ *U.S. Metro Economies: US Metros Compared to Global and State Economies*, U.S. CONF. OF MAYORS 10–11 (June 2022), <https://www.usmayors.org/wp-content/uploads/2022/06/USCM-FINAL-FINAL-Metro-Economy-Report-Final-6-3-22.pdf> [<https://perma.cc/SQ4E-8AX3>]; *The Top 25 Metro Areas Make Up Half of U.S. GDP*, STATISTA (July 12, 2019), <https://www.statista.com/chart/18684/us-cities-by-gdp/#:~:text=Jul%2012%2C%202019-,GDP%20of%20the%20U.S.,as%20the%20other%20359%20cites> [<https://perma.cc/2VSN-XUX9>].

⁶ STATISTA, *supra* note 5.

⁷ U.S. CONF. OF MAYORS, *supra* note 5, at 1.

⁸ U.S. CONST. amend. X.

Typically, states either follow Dillon's Rule or Home Rule.⁹ Dillon's Rule, named after Iowa Supreme Court Justice John Forest Dillon, interprets city powers narrowly.¹⁰ In a Dillon's Rule jurisdiction, a city may exercise only those powers expressly delegated by the state.¹¹ By contrast, New York, like many other large cities, has constitutionally guaranteed Home Rule powers—meaning that the city has the general power to enact laws to regulate and to provide services.¹²

Cities are at the epicenter of today's environmental and social crises. These are the governments responding to our nation's deepest and most pressing policy concerns. As such, Home Rule cities are uniquely positioned to serve as laboratories for policy experimentation and progress. The interplay between federal, state, and local authority creates both opportunities and constraints for municipal action. On the positive side of the ledger: cities operate on a local scale and are the point of delivery for government services. Cities often have the capacity to (relatively) rapidly implement policies tailored to local needs. Moreover, the connections between local governance choices and community impacts are frequently visible and legible. On the negative side, even Home Rule cities have bounded authority, and their policy initiatives are vulnerable to state and federal interference.¹³

New York City has been threading this needle successfully. Over the past two decades, New York City has emerged as a leader in environmental innovation, leveraging its legal authority, political will, and creative problem-solving to tackle pressing local problems with global implications. Ever since Superstorm Sandy, the city has been acutely aware of the threats it faces from climate change, including

⁹ See generally Alvin D. Sokolow, *Dillon's Rule*, CTR. FOR STUDY OF FEDERALISM (2006), <https://federalism.org/encyclopedia/no-topic/dillons-rule/> [https://perma.cc/Z6D8-5V9B] (explaining Dillon's Rule); Richard Briffault, *Home Rule for the Twenty-First Century*, 36 URB. LAW. 253 (2004) (describing the importance of home rule).

¹⁰ See *Clinton v. Cedar Rapids & Mo. River R. R. Co.*, 24 Iowa 455, 475 (1868) (finding that cities “owe their origin to, and derive their powers and rights wholly from, the legislature.”).

¹¹ *Id.* See also *Trenton v. New Jersey*, 262 U.S. 182, 187 (1923) (finding that unless there was a state constitutional provision to the contrary, cities had “no inherent right of self-government which is beyond the legislative control of the State,” characterizing them instead as mere “department[s] of the State,” with “powers and privileges” such as the State has seen fit to grant). Many states, by their constitution, guarantee some or all municipalities the right of home rule. See National League of Cities, *Principles of Home Rule for the 21st Century* 10–13 (2020) (describing the evolution of home rule and showing that many states by their constitution guarantee some or all municipalities the right of home rule) <https://www.nlc.org/wp-content/uploads/2020/02/Home-Rule-Principles-ReportWEB-2-1.pdf> [https://perma.cc/R9DU-AGTD].

¹² N.Y. CONST. art. IX § 2(c) (guaranteeing this right to local governments); see National League of Cities, *Principles of Home Rule for the 21st Century*, 100 N.C. L. REV. 1329 (2022) (discussing home rule).

¹³ As just one example, New York City has been trying to create a congestion pricing zone for at least a decade. State and federal obstruction continually prevented the program until 2024. And now the Trump administration purports to have withdrawn federal approval. For an overview of this history, see Kate Slevin, *Congestion Pricing: A Retrospective*, REG'L PLAN ASS'N (Jan. 27, 2025), <https://rpa.org/news/lab/congestion-pricing-a-retrospective> [https://perma.cc/JJ75-HE6Z]. For an explanation of state interference with local decision-making, see generally Quinton D. Lucas and Gavriel Schreiber, *Post-Emption and the Mayoral Toolbox: Levers and Limits of City Resistance to State Preemption*, 91 CHI. L. REV. 2229 (2024).

sea-level rise, extreme weather events, and urban heat island effects.¹⁴ These climate-related threats are compounded by the city's dense population, aging infrastructure, and the legacy of structural racism which has left low-income communities and communities of color disproportionately burdened by pollution and environmental hazards.¹⁵

New York starts this environmental journey with some unique advantages and disadvantages. For example, the average New York City resident relies on public transit,¹⁶ does not own a car, and lives in a relatively small unit within a multi-family dwelling.¹⁷ As a result, these New Yorkers generate a tiny fraction of the carbon and pollution associated with suburban and rural American life. Yet, the city generates vast quantities of waste each day, all of which is exported to other communities for disposal. New York City is thus both a contributor to, and victim of, environmental degradation.

New York City has consistently demonstrated its ability to turn these challenges into opportunities, crafting policies that address both environmental and social inequities while advancing sustainability goals. Since 2017, New York City has had local laws requiring that environmental justice concerns be incorporated into all New York City decision-making and that all city agencies identify opportunities for promoting environmental justice.¹⁸ This Article highlights three of the city's more transformative and ambitious sustainability projects that seek to do this—Renewable Rikers, the Daylighting of Tibbetts Brook, and Local Law 97's building retrofit requirements. All three projects exemplify how municipalities can take local action that recognize the nexus between urban health, racial equality, and sustainability, thereby achieving multiple goals at once. These important policy innovations demonstrate how creative urban policymaking can build what the Kansas Journal of Law and Public Policy 2025 conference called "Cities of Tomorrow." This Article begins with some level setting about the environmental

¹⁴ *A Stronger More, Resilient New York*, N.Y.C. MAYOR'S OFF. OF CLIMATE & ENV'T JUST. 9–26 (2013), https://s-media.nyc.gov/agencies/sirr/SIRR_spreads_Lo_Res.pdf [<https://perma.cc/RJT5-SJSF>].

¹⁵ Sheila R. Foster, Ana Baptista, Khai Hoan Nguyen, Jack Tchen, Marco Tedesco & Robin Leichenko, *NPCC4: Advancing Climate Justice in Climate Adaptation Strategies for New York City*, 1539 ANNALS N.Y. ACAD. SCI. 77 (Aug. 19, 2024).

¹⁶ Commuters make more than a billion trips a year on public transit in New York City. Ben Brachfeld, *NYC Subway Hits 1 Billion Riders in 2024, on Track for a Post-Pandemic Record Pace*, AMNY (Nov. 4, 2024), <https://www.amny.com/nyc-transit/nyc-subway-billion-riders-2024/> [<https://perma.cc/W5H7-A7BB>]. Only a minority of New York households own cars, and if Staten Island (which has very limited transit options) is excluded, it is a small minority. Thomas P. DiNapoli, *The Cost of Living in New York City: Transportation*, OFF. N.Y. STATE COMPTROLLER (Oct. 2024), <https://www.osc.ny.gov/files/reports/pdf/report-16-2025.pdf> [<https://perma.cc/F93H-VC82>].

¹⁷ More than seventy percent of New York City's housing stock is in buildings with three or more units. Nearly a quarter is in buildings with more than 100 units. U.S. Census Bureau, *2023 New York City Housing and Vacancy Survey* 2–3 (2023), <https://www.nyc.gov/assets/hpd/downloads/pdfs/about/2023-nychvs-selected-initial-findings.pdf> [<https://perma.cc/UWN9-7AQB>].

¹⁸ See, e.g., N.Y.C., N.Y., LOCAL LAW 64 (2017); N.Y.C., N.Y., LOCAL LAW 60 (2017).

justice and climate challenges we face. It then provides an overview of these three New York City projects, emphasizing how each project reimagines the urban space to respond to environmental and environmental justice challenges.

Each project is a victory. Like all social justice victories, each is partial, contingent, and incomplete—what Kansas City's Mayor, Quinton Lucas, describes as “bittersweet half wins.”¹⁹ Nevertheless, they are victories and should be understood as such. They should be celebrated, studied, and expanded upon. Each represents a way that New York City is using its authority under state law to simultaneously address environmental problems, climate problems, and racial justice problems. The city is taking these steps because it recognizes that these are not individual problems amenable to individual solutions. Rather, they are all aspects of the same problem. By thinking creatively about law, New York is making progress on environmental, climate, and racial justice goals at once. In this era of rapid and profound federal retreat from all three, the role of cities (and states) is even more important than it was when the Kansas Journal of Law and Public Policy planned this conference.

I. THE FORCES ARRAYED AGAINST US

We are in a climate emergency.²⁰ The ten warmest years on record have been the last ten years.²¹ In 2024, we crossed the unenviable mark of global mean temperature exceeding 1.5 degrees Celsius (2.7 degrees Fahrenheit) above pre-industrialization levels.²² That is the level that the Paris Agreement indicated as its goal in order to ward off the worst impacts of climate change.²³ The new year continued this trend, with January 2025 being the hottest on record—1.75 degrees Celsius (3.15 degrees Fahrenheit) above pre-industrial levels.²⁴ Rather than grapple with this urgent and growing crisis, however, the Trump administration has instead removed all mention of climate change from federal websites.²⁵ The administration

¹⁹ Lucas & Schreiber, *supra* note 13 at 2233.

²⁰ *The Climate Emergency*, UN ENV'T PROGRAMME, <https://www.unep.org/climate-emergency> [<https://perma.cc/S979-DTQB>]. In 2023, UN Secretary General António Guterres famously stated that the era of global warming has ended and “the era of global boiling has arrived.” Ajit Niranjana, ‘Era of Global Boiling Has Arrived,’ Says UN Chief as July Set to be Hottest Month on Record, THE GUARDIAN (Jul. 27, 2023), <https://www.theguardian.com/science/2023/jul/27/scientists-july-world-hottest-month-record-climate-temperatures> [<https://perma.cc/S4SW-ZHXX>].

²¹ *WMO Confirms 2024 as Warmest Year on Record at About 1.55°C Above Pre-Industrial Levels*, WORLD METEOROLOGICAL ORG. (Jan. 10, 2025), <https://wmo.int/news/media-centre/wmo-confirms-2024-warmest-year-record-about-155degc-above-pre-industrial-level> [<https://perma.cc/NL4H-NUDC>].

²² *Id.*

²³ Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104.

²⁴ United Nations, *It's Official: January Was the Warmest on Record*, UN NEWS (Feb. 6, 2025), <https://news.un.org/en/story/2025/02/1159846> [<https://perma.cc/UKW6-8SNP>].

²⁵ Oliver Milman, *Scientists Brace 'for the Worst' as Trump Purges Climate Mentions from Websites*, THE GUARDIAN (Feb. 4, 2025), <https://www.theguardian.com/us-news/2025/feb/04/trump-climate-change-federal-websites> [<https://perma.cc/E84Y-ZT6Q>]; Will Steakin, *USDA Orders Removal of Climate Change Mentions from Public Websites*, ABC NEWS (Jan. 31, 2025, 1:18 PM), <https://abcnews.go.com/US/usda-orders-removal-climate-change-mentions-public-websites/story?id=118312216> [<https://perma.cc/YK4E-SG2X>].

announced its intention to ramp up domestic fossil fuel production,²⁶ weaken vehicle fuel efficiency standards,²⁷ and to put up roadblocks to carbon free energy production.²⁸ These measures will result in increased carbon emissions and will exacerbate the climate crisis.

At the same time that he took these steps to promote fossil fuel use and undermine the fight against climate change, Trump simultaneously abandoned the federal government's decades long commitment to environmental justice.²⁹ His administration summarily closed environmental justice offices and fired any worker whose job title seemed to relate in any way to environmental justice, which Trump views as part of the DEI (diversity, equity, and inclusion) initiatives that he is determined to wipe out.³⁰ For clarity, environmental justice is simply the principle that all people are entitled to fair treatment and meaningful involvement in the environmental decisions that affect their communities.³¹

The intersection of these Trump policies—increasing fossil fuel use and de-emphasizing environmental justice—will have tragic consequences. Burning more fossil fuel does not just mean emitting more carbon dioxide into the atmosphere. Fossil fuel combustion releases carbon dioxide alongside other air pollutants like particulate matter (PM_{2.5}, PM₁₀), nitrogen oxides (NO_x), sulfur oxides (SO_x) and volatile organic compounds (VOCs)—all of which can be deadly to people and animals that like to breathe.³² Exposure to air pollutions causes heart disease,³³ and

²⁶ Exec. Order No. 14,156, 90 Fed. Reg. 8433 (Jan. 20, 2025).

²⁷ Alice Kaswan, *President Trump's War on Electric Vehicles: Part II*, CTR. PROGRESSIVE REFORM (Feb. 18, 2025), <https://progressivereform.org/cpr-blog/trump-war-on-electric-vehicles-part-ii/> [<https://perma.cc/5YD7-2HA5>].

²⁸ Memorandum of January 20, 2025, 90 Fed. Reg. 8363 (Jan. 20, 2025).

²⁹ Exec. Order No. 14,174, 90 Fed. Reg. 8637 (Jan. 21, 2025) (repealing multiple executive orders).

³⁰ Valerie Volcovici, Sarah N. Lynch & Jeff Mason, *Trump Administration Cuts Environmental Justice Programs at EPA, DOJ*, REUTERS (Feb. 6, 2025, 5:39 PM), <https://www.reuters.com/world/us/trump-administration-cuts-environmental-justice-programs-epa-doj-sources-say-2025-02-06/> [<https://perma.cc/LA2C-X5QJ>].

³¹ See generally CLIFFORD VILLA, NADIA AHMAD, REBECCA BRATSPIES, ROGER LIN, CLIFFORD RECHTSCHAFFEN, EILEEN GAUNA & CATHERINE O'NEILL, ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION (3rd ed. 2020). The iconic articulation of “*environmental justice*” comes from the 1991 statement issued at the First National People of Color Environmental Leadership Summit. *The Principles of Environmental Justice*, ENERGY JUST. NETWORK (Oct. 1991), <https://www.ejnet.org/ej/principles.html> [<https://perma.cc/Z889-5UDG>]. These principles include the demand “that public policy be based on mutual respect and justice for all peoples, free from any form of discrimination or bias.”

³² Rongqi Abbie Liu, Yaguang Wei, Xinye Qiu, Anna Kosheleva & Joel D. Schwartz, *Short Term Exposure to Air Pollution and Mortality in the US: A Double Negative Control Analysis*, 21 ENV'T HEALTH 1 (2022).

³³ Robert D. Brook, Sanjay Rajagopalan, C. Arden Pope III, Jeffrey R. Brook, Aruni Bhatnagar, Ana V. Diez-Roux, Fernando Holguin, Yuling Hong, Russell V. Luepker, Murray A. Mittleman, Annette Peters, David Siscovick, Sidney C. Smith, Jr., Laurie Whitsel & Joel D. Kaufman, *Particulate Matter Air Pollution and Cardiovascular Disease*, 121 CIRCULATION 2331 (2010).

an array of other cardiopulmonary conditions,³⁴ including asthma,³⁵ strokes³⁶, and chronic obstructive pulmonary disease.³⁷ Exposure can also be carcinogenic,³⁸ and can harm the immune, endocrine, nervous, and reproductive systems. In short, the polluting activities promoted by the Trump Administration will drive climate change while simultaneously putting people at increased risk for a wide array of illness and disease.

Neither the air pollution nor the health risks it creates are distributed equally. Instead, despite generating much less pollution than their white counterparts, people of color are exposed to much more pollution.³⁹ Americans of color are twice as likely to live in communities with unhealthy air than are white Americans.⁴⁰ This phenomenon is systemic, holding true across states, in both urban and rural areas, and across all income levels.⁴¹ The systemic nature of this inequality is so well documented that in a recent judicial opinion a Fourth Circuit Judge, J. Harvie Wilkinson (appointed by Ronald Reagan), wrote: “[i]t is well-established—almost to the point of judicial notice—that environmental harms are visited disproportionately upon the dispossessed . . . on minority populations and poor communities”⁴² This racialized and systematically unequal distribution of pollution produces profound health inequities. For example, Black Americans have more than double the risk of dying from asthma-related complications.⁴³

³⁴ Fangfang Li, Zhen An, Haibin Li, Xia Gao, Gui Wang & Weidong Wu, *Involvement of Oxidative Stress and the Epidermal Growth Factor Receptor in Diesel Exhaust Particle-Induced Expression of Inflammatory Mediators in Human Mononuclear Cells*, 15 *MEDIATORS INFLAMMATION* 1 (2019).

³⁵ George D. Thurston & Mary B. Rice, *Air Pollution Exposure and Asthma Incidence in Children*, 321 *J. AM. MED. ASS'N* 1875 (2019).

³⁶ Anoop S. V. Shah, Kuan Ken Lee, David A. McAllister, Amanda Hunter, Harish Nair, William Whiteley, Jeremy P. Langrish, David E. Newby & Nicholas L. Mills, *Short Term Exposure to Air Pollution and Stroke: Systematic Review and Meta-Analysis*, 350 *BMJ* 1 (2015).

³⁷ Sha Liu, Yumin Zhou, Suixin Liu, Xinyu Chen, Weifeng Zou, Dongxing Zhao, Xiaochen Li, Jinding Pu, Lingmei Huang, Jinlong Chen, Bing Li, Shiliang Liu & Pixian Ran, *Association Between Exposure to Ambient Particulate Matter and Chronic Obstructive Pulmonary Disease: Results from a Cross-Sectional Study in China*, 72 *BMJ THORAX* 788 (2017).

³⁸ *The Carcinogenicity of Outdoor Air Pollution*, 14 *LANCET ONCOLOGY* 1262 (2013) (analyzing multiple studies).

³⁹ Christopher W. Tessum, Joshua S. Apte, Andrew L. Goodkind, Nicholas Z. Muller, Kimberely A. Mullins, David A. Paoella, Stephen Polasky, Nathaniel P. Springer, Sumil K. Thakrar, Julian D. Marshall & Jason D. Hill, *Inequity in Consumption of Goods and Services Adds to Racial-Ethnic Disparities in Air Pollution Exposure*, 116 *PROC. NAT'L ACAD. SCI.* 6001 (2019) (documenting how racial groups disproportionately generate or bear the burdens of pollution); Ihab Mikati, Adam F. Benson, Thomas J. Luben, Jason D. Sacks & Jennifer Richmond-Bryant, *Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status*, 108 *AM. J. PUB. HEALTH* 480 (2018) (reporting that in the most polluted counties in the United States, people of color are a significant majority of residents, despite being a minority overall in the United States).

⁴⁰ *Key Findings*, *AM. LUNG ASS'N* (2024), <https://www.lung.org/research/sota/key-findings> [<https://perma.cc/V7G8-Z4EL>].

⁴¹ Mikati et al., *supra* note 39 (demonstrating that racial disparities in pollution exposure are more pronounced than disparities based on economic status).

⁴² *McKiver v. Murphy-Brown, LLC*, 980 F.3d 937, 982 (4th Cir. 2020) (Wilkinson, J., concurring).

⁴³ *Most Recent National Asthma Data*, CDC (data as of 2021), https://www.cdc.gov/asthma/most_recent_national_asthma_data.htm [<https://perma.cc/H9W7-97MS>]. This situation is compounded by unequal access to health care. David R. Williams & Toni

II. HOW DID WE GET HERE?

To understand these current urban environmental disparities and their attendant disparate health outcomes, it is necessary to first understand the impacts of redlining on urban communities.⁴⁴ This ninety-year-old history has a direct relationship with who breathes polluted air, who drinks contaminated water, and who lives on toxic land today, and who does not.

During the Great Depression, many people were unemployed and at risk of losing their homes to foreclosure. In response, the United States created the Home Owners' Loan Corporation (HOLC), a new federal agency empowered to rescue distressed homeowners.⁴⁵ HOLC did so by guaranteeing and refinancing overdue mortgages on better terms with lower interest rates and longer repayment schedules.⁴⁶ And it did this successfully for more than one million homeowners during the Great Depression.⁴⁷ The caveat—HOLC did so for white homeowners, at the expense of everyone else.⁴⁸

To determine which loans to guarantee, HOLC created maps assessing the investment risks in cities across the United States.⁴⁹ These maps divided urban neighborhoods into four color-coded designations: green, blue, yellow, and red. Areas colored green were deemed to have the highest investment potential. Blue meant still desirable. Yellow equaled “in decline.” Then came the areas deemed hazardous for investment: those neighborhoods were outlined in red. Overwhelmingly, these redlined neighborhoods were majority-Black neighborhoods. This was not a secret. It was on the face of the maps themselves, and in the text of the accompanying reports. In fact, “infiltration” by Black or Jewish people, or “mixed races” were explicitly identified as factors that lowered a neighborhood’s value and as the reason for a red designation.⁵⁰ The government then

D. Rucker, *Understanding and Addressing Racial Disparities in Health Care*, 21 HEALTH CARE FIN. REV. 75 (2000).

⁴⁴ The recently issued EJNYC Report underscored the present-day legacy of this historical practice. *A Study of Environmental Justice Issues in New York City*, N.Y.C. MAYOR’S OFF. CLIMATE & ENV’T JUST. 28–30 (2024), <https://climate.cityofnewyork.us/topic/environmental-justice/> [https://perma.cc/PG45-83CX].

⁴⁵ Home Owners’ Loan Act of 1933, 12 U.S.C. §§ 1461–1468.

⁴⁶ *Id.* at § 1463(d)(2).

⁴⁷ *Statement by the President on the Record of the Home Owners’ Loan Corporation*, NAT’L ARCHIVES (Mar. 9, 1950), <https://www.trumanlibrary.gov/library/public-papers/51/statement-president-record-home-owners-loan-corporation> [https://perma.cc/W89M-CK3M].

⁴⁸ RICHARD ROTHSTEIN, *THE COLOR OF LAW* 18–19 (2017). A 1950s assessment of the HOLC program noted that in New York City, 86 percent of the properties insured under HOLC loans were in “native white” or “native white and foreign” neighborhoods and only 1 percent were from neighborhoods described as “Negro.” C. LOWELL HARRISS, *HISTORY AND POLICIES OF THE HOME OWNERS’ LOAN CORPORATION* 53 (1951).

⁴⁹ These maps are available from the University of Richmond’s *Mapping Inequality* project. *Mapping Inequality*, UNIV. RICH., <https://dsl.richmond.edu/panorama/redlining/> [https://perma.cc/U3GU-ZEFX].

⁵⁰ The thousands of neighborhood security reports that went into producing the redlining maps are available from the *Mapping Inequality* project, alongside the maps themselves. *Id.*

used these maps to determine where it would guarantee loans. Banks refused to issue mortgages for home buyers seeking to buy in “declining” or “hazardous” neighborhoods.⁵¹

The practice of redlining devastated Black communities by starving them of investment and driving down home values.⁵² By restricting access to financing and suppressing land values, redlining created a cycle of disinvestment. This kind of overt racial discrimination is illegal today, prohibited by the Fair Housing Act of 1968.⁵³ But the effects of redlining still linger. Many profound environmental inequities, including the disproportionate siting of polluting infrastructure in formerly redlined neighborhoods, trace their origins to redlining.⁵⁴ New York City identifies the legacy of redlining as a key variable in the interconnected web of issues that create environmental injustice in the city today.⁵⁵ For example, there is a clear correlation between the redlining map of NYC and the spatial distribution of many environmental and health issues including heat vulnerability.⁵⁶ As the climate changes, heat vulnerability will only get worse. Those most vulnerable to heat are those in old or poorly maintained housing, those without air conditioning, and those in neighborhoods with few trees and green spaces—all of which is the legacy of redlining.⁵⁷

One of the most pernicious impacts from this racist history is the way that the legacy of redlining continues to harm children today. Redlined communities have higher rates of air pollution today.⁵⁸ This air pollution poses unique health risks

⁵¹ LaDale C. Winling & Todd M. Michney, *The Roots of Redlining: Academic, Governmental, and Professional Networks in the Making of the New Deal Lending Regime*, 108 J. AM. HIST. 42, 62 (2021).

⁵² *Id.* at 42–43.

⁵³ 42 U.S.C. §§ 3601–19.

⁵⁴ N.Y.C. MAYOR'S OFF. CLIMATE & ENV'T JUST, *supra* note 44, at 29.

⁵⁵ *Id.* at 54–57.

⁵⁶ *Protecting New Yorkers from Extreme Heat*, NYSERDA, <https://www.nyserda.ny.gov/Featured-Stories/Protecting-New-Yorkers-from-Extreme-Heat> [<https://perma.cc/M7KF-7Y49>] (making this connection); Jeremy S. Hoffman, Vivek Shandas & Nicholas Pendleton, *The Effects of Historical Housing Policies on Resident Exposure to Intra-Urban Heat: A Study of 108 US Urban Areas*, 8 CLIMATE 1, 9–12 (2020).

⁵⁷ Ryan DoanNguyen, *Scorched by History: Discriminatory Past Shapes Heat Waves in Minority and Low-Income Neighborhoods*, ASSOCIATED PRESS (Jul. 8, 2024), <https://www.ap.org/news-highlights/spotlights/2024/scorched-by-history-discriminatory-past-shapes-heat-waves-in-minority-and-low-income-neighborhoods/> [<https://perma.cc/JW8U-D6A7>]; David J. Nowak, Alexis Ellis & Eric J. Greenfield, *The Disparity in Tree Cover and Ecosystem Service Values Among Redlining Classes in the United States*, 221 LANDSCAPE & URB. PLAN. 1 (2022); *Extreme Heat*, N.Y.C. MAYOR'S OFF. CLIMATE & ENV'T JUST., <https://climate.cityofnewyork.us/challenges/extreme-heat/> [<https://perma.cc/75KF-EWJZ>].

⁵⁸ Haley M. Lane, Rachel Morello-Frosch, Julian D. Marshall & Joshua S. Apte, *Historical Redlining is Associated with Present-Day Air Pollution Disparities in U.S. Cities*, 9 ENV'T SCI. & TECH. LETTERS 345 (2022); *see also* Cesar O. Estien, Christine E. Wilkinson, Rachel Morello-Frosch & Christopher J. Schell, *Historical Redlining is Associated with Disparities in Environmental Quality Across California*, 11 ENV'T SCI. & TECH. LETTERS 54 (2024).

for children⁵⁹ because their bodies are still developing.⁶⁰ Exposure to high levels of air pollution is closely tied to elevated childhood asthma rates.⁶¹ The same neighborhoods that were redlined, that are majority Black and Latinx today, that have the highest heat vulnerability, also have the highest childhood asthma rates.⁶² Childhood asthma is a predictor of days missed from school,⁶³ which in turn is one of the the biggest predictors of involvement with the criminal justice system.⁶⁴ This correlation between environmental injustice and mass incarceration is further amplified by the reality that many of the neighborhoods most overburdened with

⁵⁹ Franziska Rosser, *Outdoor Air Pollution and Pediatric Respiratory Disease*, 45 CLINICS IN CHEST MED. 531 (2024); WHO, *Air Pollution and Child Health: Prescribing Clean Air* (2018), <https://iris.who.int/bitstream/handle/10665/275545/WHO-CED-PHE-18.01-eng.pdf?sequence=2> [<https://perma.cc/94LS-PK5S>].

⁶⁰ Diganta Saikia & Bandana Mahanta, *Cardiovascular and Respiratory Physiology in Children*, 63 INDIAN J. ANAESTHESIA 690 (2019). These same physiological characteristics make children uniquely vulnerable to the impacts of climate change. EPA, *Climate Change and Children's Health and Well-Being in the United States* (2023), https://www.epa.gov/system/files/documents/2023-04/CLiME_Final%20Report.pdf [<https://perma.cc/6RJY-WK9S>].

⁶¹ Matthew C. Altman, Meyer Kattan, George T. O'Connor, Ryan C. Murphy, Elizabeth Whalen, Petra LeBeau, Agustin Calatroni, Michelle A. Gill, Rebecca S. Gruchalla, Andrew H. Liu, Stephanie Lovinsky-Desir, Jacqueline A. Pongracic, Carolyn M. Kerckmar, Gurjit K. Hershey Khurana, Edward M. Zoratti, Stephen J. Teach, Leonard B. Bacharier, Lisa M. Wheatley, Steve M. Sigelman, Peter J. Gergen, Alkis Togias, William W. Busse, James E. Gern & Daniel J. Jackson, *Associations Between Outdoor Air Pollutants and Non-Viral Asthma Exacerbations and Airway Inflammatory Responses in Children and Adolescents Living in Urban Areas in the USA: A Retrospective Secondary Analysis*, 7 LANCET PLANETARY HEALTH E33 (2023) (finding that exposure to increased PM_{2.5} and ozone pollution were significantly correlated with asthma).

⁶² Patrick H. Ryan, Antonella Zanobetti, Brent A. Coull, Howard Andrews, Leonard B. Bacharier, Dakota Bailey, Paloma I. Beamer, Jeff Blossom, Cole Brokamp, Soma Datta, Tina Hartert, Gurjit K. Khurana Hershey, Daniel J. Jackson, Christine C. Johnson, Christine Joseph, Jorja Kahn, Nathan Lothrop, Margee Louisias, Heike Luttmann-Gibson, Fernando D. Martinez, Eneida A. Mendoça, Rachel L. Miller, Dennis Ownby, Sima Ramratnam, Christine M. Seroogy, Cynthia M. Visness, Anne L. Wright, Edward M. Zoratti, James E. Gern & Diane R. Gold, *The Legacy of Redlining: Increasing Childhood Asthma Disparities through Neighborhood Poverty*, 210 AM. J. RESPIRATORY CRITICAL CARE MED. 1201 (2024); Sonali Bose & Kecia Carroll, *An Unfortunate Inheritance: Child Asthma in the Aftermath of Redlining*, 210 AM. J. RESPIRATORY CRITICAL CARE MED. 1171 (2024).

⁶³ See Sara B. Johnson, Paul Spin, Faith Connolly, Marc Stein, Tina L. Cheng & Katherine Connor, *Asthma and Attendance in Urban Schools*, 16 PREVENTING CHRONIC DISEASE 1 (2019); Joy Hsu, Xiaoting Qin, Suzanne F. Beavers & Maria C. Mirabelli, *Asthma-Related School Absenteeism, Morbidity, and Modifiable Factors*, 51 AM. J. PREVENTATIVE MED. 23 (2016).

⁶⁴ Prison Policy Initiative & VOCAL-NY, *Mapping Disadvantage: The Geography of Incarceration in New York State* (Feb. 19, 2020), <https://www.prisonpolicy.org/origin/ny/report.html> [<https://perma.cc/FTW3-88P9>] (documenting that high imprisonment communities have high youth asthma rates). This is a correlation, not a causal link. It is important to remember that most children with asthma and indeed most children who miss a lot of school do not become involved with the criminal justice system. Robert Balfanz & Vaughan Byrnes, *Meeting the Challenge of Combating Chronic Absenteeism*, JOHNS HOPKINS SCH. OF EDUC., <https://www.attendanceworks.org/wp-content/uploads/2017/09/NYC-Chronic-Absenteeism-Impact-Report-Nov-2013.pdf> [<https://perma.cc/YW9Y-9ED7>].

polluting infrastructure are frequently also the neighborhoods targeted for over-policing.

III. WHAT CAN WE DO?

The problems are legion and daunting. It took us decades to get here and we are still working to understand the contours of the challenges we face. But as lawyers, our job is not just to identify problems but to solve them. To that end, I offer some lessons from New York City that demonstrate how substantive legal tools can be deployed to build real change for real people on the ground. Taking a leaf from the pages of the poet Adrienne Rich, it is important to remember the power we have, not just the obstacles we face.⁶⁵

Society solves environmental problems best by prioritizing protecting the most vulnerable and the most impacted. For this reason, the lessons I offer consist of three innovative urban environmental projects, all of which start and end with environmental justice. Each is a work in progress. Each has strengths and weaknesses, and each offers lessons for what to do and what to avoid. By sharing these partial, contingent lessons, my hope is that readers will see something they can use in their own practice, in their own city. By learning from each other, we can build an upswell of local level victories for the environment.

A. Lesson #1 Renewable Rikers

Renewable Rikers is a plan to tie the closure of New York City's main jail on Rikers Island with the construction of state-of-the-art green infrastructure.⁶⁶ Embodied in three local laws collectively known as Renewable Rikers,⁶⁷ this plan demonstrates the transformative potential of intentional, creative policymaking that pays attention to the intersections between social justice, racial justice, and environmental justice. Renewable Rikers meets current and future sustainability needs through decisions that respond to the legacy of brutality and racialized injustice at the Rikers Island jail.⁶⁸

⁶⁵ At the end of *Poem XVII* Rich wrote:

“and these are the forces they had ranged against us,
and these are the forces we had ranged within us.”

ADRIENNE RICH, *Poem XVII*, in *THE DREAM OF A COMMON LANGUAGE: POEMS 1974–1977* 29–30 (1978). This is how I see this essay—with parts I and II describing the forces ranged against us, and part III hinting at some of the forces ranged within us.

⁶⁶ See generally Rebecca Bratspies, *Renewable Rikers: A Plan for Restorative Environmental Justice*, 66 LOY. L. REV. 371 (2020) (describing the genesis of the Renewable Rikers project).

⁶⁷ The three local laws that are collectively known as Renewable Rikers are Local Laws 16, 17, and 31 of 2021. N.Y.C., N.Y., Local Law 16 (2021); N.Y.C., N.Y., Local Law 17 (2021); N.Y.C., N.Y., Local Law 31 (2021).

⁶⁸ For a detailed exploration of these issues, see generally Rebecca Bratspies, *What Makes it a Just Transition? A Case Study of Renewable Rikers*, 40 PACE ENV'T L. REV. 1 (2023).

The island's entire history has been toxic. In 1884, New York City bought Rikers Island from the Rikers family.⁶⁹ At the time, Rikers Island was ninety-eight square acres. By dumping coal ash and other trash into the East River to fill in the island's shoals,⁷⁰ New York City "reclaim[ed]" what it described as underwater land,⁷¹ thereby more than tripling the size of Rikers Island. This hard, dangerous work was performed by forced prison labor.⁷² In 1935, the newly enlarged island became New York City's main jail.⁷³ The Rikers Island jail quickly became infamous as reports,⁷⁴ exposés,⁷⁵ and lawsuits⁷⁶ documented patterns of gratuitous and excessive violence at Rikers.⁷⁷ Indeed, the Rikers Island jail ranks as one of the ten worst correctional facilities in the United States.⁷⁸ Worse, more than eighty percent of those detained on Rikers Island are pre-trial detainees—people who have been convicted of nothing and are in custody only because they cannot afford bail.⁷⁹

⁶⁹ The Rikers family made their fortune by exploiting enslaved labor. For a description of Richard Riker's involvement in what came to be known as the kidnapping club, an infamous scheme to kidnap free Black New Yorkers, declare them to be fugitive slaves, and send them into slavery in the South, see REBECCA BRATSPIES, *NAMING GOTHAM: THE VILLAINS, ROGUES & HEROES BEHIND NEW YORK'S PLACE NAMES* 117–20 (2023). For more on this topic, see also JONATHAN DANIEL WELLS, *THE KIDNAPPING CLUB: WALL STREET, SLAVERY, AND RESISTENCE ON THE EVE OF THE CIVIL WAR* (2020).

⁷⁰ *Reclaiming Riker's Island*, N.Y. TIMES, Nov. 25, 1900, at 15.

⁷¹ *Riker's Island Harbor Line*, N.Y. TIMES, Jan. 17, 1893, at 9.

⁷² For more on the forced labor that built Rikers Island, see Jarrod Shanahan & Jayne Mooney, *New York City's Captive Work Force: Remembering the Prisoners Who Built Rikers Island*, 56 INT'L J. L., CRIME & JUST. 13 (2019).

⁷³ *462 Prisoners Moved*, N.Y. TIMES, Dec. 3, 1935, at 4.

⁷⁴ See GRAHAM RAYMAN & REUVEN BLAU, *RIKERS: AN ORAL HISTORY* (2023) (detailing fifty years of stories from Rikers Island); The Nunez Monitoring Team, *Status Report on DOC's Action Plan by the Nunez Independent Monitor* 15 (Apr. 24, 2023), <https://storage.courtlistener.com/recap/gov.uscourts.nysd.383754/gov.uscourts.nysd.383754.520.0.pdf> [<https://perma.cc/Q5DF-CZE3>].

⁷⁵ See U.S. DEP'T OF JUSTICE, *CRIPA Investigation of the New York City Department of Correction Jails on Rikers Island* (Aug. 4, 2014) [hereinafter *CRIPA Investigation*], <https://www.justice.gov/sites/default/files/usao-sdny/legacy/2015/03/25/SDNY%20Rikers%20Report.pdf> [<https://perma.cc/GHH6-GFJE>]; Graham Rayman, *Rikers Violence: Out of Control*, VILLAGE VOICE (May 9, 2012), <https://www.villagevoice.com/rikers-violence-out-of-control/> [<https://perma.cc/E7LE-34EF>].

⁷⁶ See, e.g., *Sheppard v. Phoenix*, 210 F. Supp. 2d 450 (S.D.N.Y. 2002).

⁷⁷ *CRIPA Investigation*, *supra* note 75, at 3 (describing "rampant use of unnecessary and excessive force by DOC staff").

⁷⁸ See James Ridgeway & Jean Casella, *America's 10 Worst Prisons: Rikers Island*, MOTHER JONES (May 14, 2013), <https://www.motherjones.com/politics/2013/05/america-10-worst-prisons-rikers-island-new-york-city/> [<https://perma.cc/XJ5C-ZQU5>]; see John Surico, *How Rikers Island Became the Most Notorious Jail in America*, VICE (Jan. 11, 2016, 1:00 AM), <https://www.vice.com/en/article/how-rikers-island-became-the-most-notorious-jail-in-america/> [<https://perma.cc/6CUY-8QM5>].

⁷⁹ See *The State of New York City Jails*, OFF. N.Y.C. COMPTROLLER (Aug. 9, 2023), <https://comptroller.nyc.gov/reports/the-state-of-new-york-city-jails/> [<https://perma.cc/2DFF-TR2V>] (reporting that eighty-seven percent of the jail's population was persons detained pretrial).

Rikers Island is toxic literally as well as metaphorically. In addition to the brutality and toxicity of the jail, the island's waste fill would for decades catch fire and emit obnoxious smoke.⁸⁰ Because so much of it is essentially a poorly-constructed landfill, the island continues to offgas methane—a potent greenhouse gas⁸¹ and probably a driver of cardiopulmonary disease.⁸² It is also directly in the flight path for LaGuardia Airport—meaning that those who work or are incarcerated on the island are exposed to an immense noise burden.⁸³

Under the leadership of *JustLeadershipUSA*, an organization headed by formerly incarcerated individuals, the case for shutting the jail at Rikers Island gained power.⁸⁴ This #CloseRikers campaign embodied the procedural environmental justice tenet of meaningful involvement from those directly impacted by a decision, and the Jemez Principle for Democratic Organizing that communities speak for themselves.⁸⁵ They organized around an audacious goal—not to make Rikers more humane but to shut it down entirely.

Responding to the groundswell of support for the #CloseRikers campaign, City Council created a panel to investigate mass incarceration in general and Rikers Island in particular. This panel, headed by former New York Chief Judge Jonathan Lippman, was tasked with considering institutional racism as part of an inquiry into whether New York City could close the jail at Rikers Island.⁸⁶ The next year, the Lippman Commission issued its first report: *Criminal Justice and Incarceration*

Under New York law, the primary justification for holding someone in pretrial detention is to ensure their presence at court proceedings. N.Y. CRIM. PRO. L. § 510.10(1). However, being held pretrial on Rikers Island actually makes it less likely that an individual will be present for court proceedings. Matt Katz, *1 in 4 People Jailed in NYC are Not Being Brought to Court on Time*, GOTHAMIST (Feb. 20, 2023), <https://gothamist.com/news/1-in-4-people-jailed-in-nyc-are-not-being-brought-to-court-on-time> [<https://perma.cc/ZNS6-M48S>].

⁸⁰ See *Says Dumps Menace Riker's Island Prison*, N.Y. TIMES, Oct. 29, 1931, at 4; *Riker's Island Use as Dump Denounced*, N.Y. TIMES, Nov. 27, 1938, at 13; *Riker's Island Dumping Nuisance*, N.Y. TIMES, Jul. 8, 1894, at 9.

⁸¹ Kathleen A. Mar, Charlotte Unger, Ludmila Walderdorff & Tim Butler, *Beyond CO2 Equivalence: The Impacts of Methane on Climate, Ecosystems, and Health*, 134 ENV'T SCI. & POL'Y 127, 128–29 (2022).

⁸² GLOBAL BURDEN DISEASE, *Global Burden of Chronic Respiratory Diseases and Risk Factors, 1990–2019: an Update from the Global Burden of Disease Study 2019*, LANCET at 5–9 (Apr. 25, 2023); Oliver Mendoza-Cano, Xóchitl Trujillo, Miguel Huerta, Mónica Ríos-Silva, Agustín Lugo-Radillo, Jaime Alberto Bricio-Barrios, José Clemente Rueda-Abad, Rebeca Yasmin Pérez-Rodríguez, Ana Luz Quintanilla-Montoya, Juan Manuel Uribe-Ramos, Valeria Argentina Mendoza-Olivo & Efrén Murillo-Zamora, *Assessing the Relationship Between Energy-Related Methane Emissions and the Burden of Cardiovascular Diseases: A Cross-Sectional Study of 73 Countries*, SCI. REP. (2023).

⁸³ Bruno Gallo, *Airport Noise Footprint Exposed, Path to Mitigation Unclear*, GOTHAM GAZETTE (Dec. 6, 2016), <https://www.gothamgazette.com/city/6654-airport-noise-footprint-exposed-path-to-mitigation-unclear> [<https://perma.cc/W92G-YSUY>].

⁸⁴ Janos Marton, #CLOSErikers: *The Campaign to Transform New York City's Criminal Justice System*, 45 FORDHAM URB. L.J. 499, 534–35 (2018). For more information, see #CLOSErikers, JUSTLEADERSHIPUSA, <https://jlusa.org/campaign/closerikers> [<https://perma.cc/3JVM-LCUM>].

⁸⁵ *Jemez Principles for Democratic Organizing: #3 Let People Speak for Themselves*, SW. NETWORK ENV'T & ECON. JUST. (Dec. 1996), <https://www.ejnet.org/ej/jemez.pdf> [<https://perma.cc/9LNT-PQCF>].

⁸⁶ *Speaker Mark Viverito's 2016 State of the City Address, Remarks as Prepared for Delivery*, N.Y.C. COUCIL (Feb. 11, 2016), <https://council.nyc.gov/press/2016/02/11/46/> [<https://perma.cc/CR5H-7V8J>].

*Reform: A More Just New York.*⁸⁷ Calling Rikers a “stain on our great city,”⁸⁸ this report unequivocally called for the Rikers Island jail to be shut. New York City Council responded with a local law setting a deadline for the closure of the jail.⁸⁹

That is where Renewable Rikers comes in. The #CloseRikers advocates teamed up with environmental justice advocates and pressed City Council to put racial justice at the center of decisions about how to repurpose the island.⁹⁰ The result was a plan to dedicate a portion of Rikers Island to large scale solar generation and battery storage⁹¹ and to build a modern waste water treatment facility on the island.⁹² These new facilities can facilitate the removal of antiquated, polluting facilities from environmental justice communities,⁹³ many of which are the same communities most impacted by incarceration on Rikers Island.⁹⁴ Perhaps most importantly, Renewable Rikers ensures that all these changes occur with the participation and involvement of those most impacted by incarceration on Rikers Island.⁹⁵

Step by step, Renewable Rikers is becoming real. A year ago, NYC issued its feasibility studies for wastewater treatment⁹⁶ and for renewable energy on Rikers Island.⁹⁷ Both studies indicate these plans are cost-effective and beneficial. The waste water treatment facility will improve water quality, produce green renewable energy, improve stormwater management through resilient renewable infrastructure, all while reducing impacts on currently overburdened communities.⁹⁸ The energy facility will generate clean energy at scales large enough to make significant

⁸⁷ *A More Just New York City*, INDEP. COMM’N ON N.Y.C. CRIM. JUST. & INCARCERATION REFORM (2017),

<https://static1.squarespace.com/static/5b6de4731aef1de914f43628/t/5b96c6f81ae6cf5e9c5f186d/1536607993842/Lippman%2BCommission%2BReport%2BFINAL%2BSingles.pdf> [<https://perma.cc/9WCR-VLTF>].

⁸⁸ *Id.* at 2.

⁸⁹ Press Release, N.Y.C. COUNCIL, *Council Votes on Historic Legislation to Close Rikers Island* (Oct. 17, 2019), <https://council.nyc.gov/press/2019/10/17/1818/> [<https://perma.cc/MY82-Q7RZ>].

⁹⁰ *NYLPI Celebrates as City Council Passes the Renewable Rikers Act*, N.Y. LAW. FOR PUB. INT. (Feb. 12, 2021), <https://www.nylpi.org/nylpi-celebrates-as-city-council-passes-the-renewable-rikers-act/> [<https://perma.cc/7G4A-UDF3>].

⁹¹ N.Y.C., N.Y., LOCAL LAW 17 (2021).

⁹² N.Y.C., N.Y., LOCAL LAW 31 (2021).

⁹³ *A Plan for Renewable Rikers*, REG’L PLAN. ASS’N 18–22 (2022).

⁹⁴ *Stop-and-Frisk-Data*, ACLU OF N.Y., <https://www.nyclu.org/en/stop-and-frisk-data> [<https://perma.cc/2UX5-UZUC>].

⁹⁵ N.Y.C., N.Y., LOCAL LAW 16 (2021). For a description of the ways that Local Law 16 builds restorative environmental justice into Renewable Rikers, see Bratspies, *supra* note 68, at 30–33.

⁹⁶ *Feasibility Study for a New Wastewater Resource Recovery Facility on Rikers Island*, N.Y.C. ENV’T PROT. (Mar. 2024), <https://www.nyc.gov/assets/dep/downloads/pdf/about/rikers-island-wrrf-feasibility-study-march-2024.pdf> [<https://perma.cc/3EVF-TCE8>].

⁹⁷ *Renewable Rikers Feasibility Study Report*, N.Y.C. MAYOR’S OFF. CLIMATE & ENV’T JUST. (Feb. 2024), <https://climate.cityofnewyork.us/wp-content/uploads/2024/06/Rikers-Report.pdf> [<https://perma.cc/27BZ-49QQ>].

⁹⁸ N.Y.C. ENV’T PROT., *supra* note 96, at 6.

contributions to New York City's climate and energy transition goals.⁹⁹ There is general agreement that these are the highest and best uses of the land.¹⁰⁰

New York City's current Mayor, Eric Adams, has dragged his feet and floated the possibility of keeping the Rikers Island jail open.¹⁰¹ City Council has refused to budge—reminding him that closing Rikers is the law.¹⁰² There is no question that Mayor Adams's intransigence has slowed the transition, making it likely that New York City will miss the 2027 statutory deadline for shutting the Rikers Island jail entirely.¹⁰³ Nevertheless, things are moving forward. This will happen.

The environmental justice and social justice victory embodied by Renewable Rikers is partial and contingent. But it is a victory! By putting racial justice and overburdened communities at the center of building clean infrastructure, Renewable Rikers offers a model for genuine and transformative change that confronts root causes of inequality and builds a better, fairer city. It does so by prioritizing justice and facilitating meaningful community involvement in these infrastructure decisions.

B. Lesson #2 Daylighting Tibbetts Brook

The plan to daylight Tibbetts Brook is a different kind of climate strategy embodying a different kind of environmental justice. It is a nature-based climate solution intended to reduce flooding, improve water quality, and provide green space that will transform a historically overburdened neighborhood.¹⁰⁴

Tibbetts Brook is a small stream that originates north of New York City and flows south. Historically, Tibbetts Brook flowed through Van Cortlandt lands into Spuyten Duyvil Creek and then into the salt marshes alongside the Harlem River. In the eighteenth century, however, major landowner and enslaver Jacobus

⁹⁹ N.Y.C. MAYOR'S OFF. CLIMATE & ENV'T JUST., *supra* note 97, at 5.

¹⁰⁰ *A Path Forward: The Blueprint to Close Rikers*, INDEP. RIKERS COMM'N 7 (March 2025), <https://static1.squarespace.com/static/5b6de4731aef1de914f43628/t/67dd7c6d4e5dca1fa86db6d8/1742568562268/Independent+Rikers+Commission+Blueprint+to+Close+Rikers+Island+March+2025.pdf> [<https://perma.cc/5M8A-2ENQ>].

¹⁰¹ Sally Goldenberg, *Down But Not Out: Eric Adams Enters Reelection Year with a Narrow Path to Victory*, POLITICO (Jan. 6, 2025, 8:55 AM), <https://www.politico.com/news/2025/01/06/eric-adams-enters-reelection-narrow-path-victory-00196546> [<https://perma.cc/N6UY-S9GG>] (emphasizing Adam's intention to put undermining bail reforms and keeping Rikers open at the center of his re-election campaign). After his deal with the Trump administration which conditionally dropped corruption charges against Adams, Adams announced a plan to allow ICE agents on Rikers Island. Craig McCarthy, Jack Morphet & Jorge Fitz-Gibbon, *NYC Mayor Adams Vows to Reopen ICE Office at Rikers Island Following Meeting with Trump Border Czar Tom Homan*, N.Y. POST (Feb. 13, 2025, 4:52 PM) <https://nypost.com/2025/02/13/us-news/eric-adams-vows-to-reopen-ice-office-at-rikers-island/> [<https://perma.cc/NZE5-7T3H>].

¹⁰² Press Release, N.Y.C. COUNCIL, *Joint Statement from Speaker Adrienne Adams and Criminal Justice Chair Sandy Nurse on the Three-Year Deadline to Close Rikers* (Aug. 30, 2024), <https://council.nyc.gov/press/2024/08/30/2686/> [<https://perma.cc/7HL6-KKMW>].

¹⁰³ INDEP. RIKERS COMM'N, *supra* note 100, at 2–5 (2025) (acknowledging that the City will not meet the 2027 deadline but emphasizing that the “decrepit, dysfunctional, and violent” jail must close as soon as possible).

¹⁰⁴ *Tibbetts Brook Daylighting Project*, N.Y.C. DEP'T ENV'T PROT., <https://www.nyc.gov/site/dep/whats-new/tibbetts-brook-daylighting-project.page> [<https://perma.cc/79BY-MXR3>].

Van Cortlandt, dammed Tibbetts Brook to provide reliable power for a gristmill.¹⁰⁵ In the process, he created what used to be known as Van Cortlandt Lake. The lake was recently renamed to Hester and Piero's Mill Pond to honor the enslaved miller, Piero, and his enslaved wife, Hester, who labored there, rather than the Van Cortlandts who enslaved them.¹⁰⁶

Around 1912, Tibbetts Brook was diverted into the Broadway sewer, created for this purpose. Burying the stream was part of a broader scheme to drain the waterway's marshland for development.¹⁰⁷ However, burying the brook did not make it "go away," nor did it reduce the amount of water flowing through the stream.¹⁰⁸ Water from Tibbetts Brook enters the sewer system at a rate of four to five million gallons of water per day (more on rainy days),¹⁰⁹ amounting to 2.2 billion gallons per year.¹¹⁰ This is clean water that has no business in a waste water treatment facility. But once it enters the sewer, the clean Tibbetts Brook waters mix with sewage. The sewer carries the resulting contaminated water to the antiquated Wards Island Wastewater Resource Recovery Facility¹¹¹ (one of the antiquated facilities that Renewable Rikers is intended to replace).

When it rains, the sewer system is overwhelmed, and water from Tibbetts Brook, along with stormwater and sewage instead bypasses the treatment facility and flows directly into the Harlem River. This is one of the largest combined sewer overflow sites in New York City. The overflow not only poses human health dangers but also disrupts the delicate balance of the Harlem River ecosystem, causing erosion and contamination with salt, oil, and roadside debris.¹¹²

¹⁰⁵ Jim Dwyer, *An Underground Brook, Gallons of Sewage and a Century-Old Problem*, N.Y. TIMES (Feb. 16, 2016), <https://www.nytimes.com/2016/02/17/nyregion/an-underground-brook-gallons-of-sewage-and-a-century-old-problem.html> [https://perma.cc/6YC2-RNHR].

¹⁰⁶ Press Release, N.Y.C. DEP'T PARKS & RECREATION, *NYC Parks and the Van Cortlandt Park Allegiance Unveil Two Newly Re/Named Park Features in Van Cortlandt Park* (June 21, 2021), <https://www.nycgovparks.org/parks/VanCortlandtPark/pressrelease/21861> [https://perma.cc/QS6S-572S].

¹⁰⁷ Winnie Hu & James Thomas, *Why New York is Unearthing a Brook It Buried a Century Ago*, N.Y. TIMES (Dec. 6, 2021), <https://www.nytimes.com/2021/12/06/nyregion/tibbetts-brook-bronx-daylighting.html> [https://perma.cc/YV9T-SS97].

¹⁰⁸ Dwyer, *supra* note 105.

¹⁰⁹ Maya Stahl, *DEP, NYC Parks Finalize Deal to 'Daylight' Tibbetts Brook, Extend Putnam Greenway*, BRONX TIMES (Jun. 14, 2024), <https://www.bxtimes.com/daylight-tibbetts-brook/> [https://perma.cc/2W7Y-RUS6].

¹¹⁰ Dwyer, *supra* note 105.

¹¹¹ Nathan Kensinger, *One of NYC's Underground Rivers May Soon be Brought Back to Life*, CURBED N.Y. (Dec. 20, 2018, 12:12 PM), <https://ny.curbed.com/2018/12/20/18150198/bronx-new-york-tibbetts-brook-daylighting-photo-essay> [https://perma.cc/A4WT-NMSK].

¹¹² *Combined Sewer Overflow (CSO)*, N.Y. STATE DEP'T OF ENV'T CONSERVATION, <https://dec.ny.gov/environmental-protection/water/water-quality/combined-sewer-overflow> [https://perma.cc/XQ9R-Q2ZK]; see also EPA's *Interim Significant Noncompliance Policy for Clean Water Act Violations Associated with CSOs, SSOs, CAFOs, and Storm Water Point Sources*, EPA (Oct. 2007), <https://www.epa.gov/sites/default/files/2013-10/documents/sncpolicy-attach1.pdf> [https://perma.cc/EZ9H-MFVW] (indicating the growing significance of water quality impairment associated with wet weather sewer overflows).

This situation leaves the city vulnerable to serious flooding. In September 2021, Hurricane Ida dumped more than seven inches of rain on New York City within a span of twenty-four hours, killing thirteen people and creating millions of dollars of damage.¹¹³ At one point, three inches of rain fell within one hour.¹¹⁴ The deluge overwhelmed New York City's combined sewer/stormwater drainage system, resulting in massive flooding.¹¹⁵ It was particularly bad along a stretch of the Major Deegan Expressway in the Bronx, where more than three feet of water inundated the expressway.¹¹⁶ This was largely water from Tibbetts Brook—water that should not have been in the sewer system in the first place.¹¹⁷

This flooding is intimately related to the history of redlining described above. The Major Deegan is one of the many highways that Robert Moses forced into the Bronx. It had devastating impacts on communities including air pollution, noise, danger, devaluing property, and bisecting neighborhoods.¹¹⁸ This road was part of Moses's vision of arterial highways that went *through* neighborhoods, rather than being a part of neighborhoods. These highways were intended for other people elsewhere—to allow them to move rapidly through a neighborhood on their way somewhere else. The neighborhoods that bore the brunt of this road construction were the same neighborhoods that were redlined, and these roads compound all the health and environmental burdens described above.

Hurricane Ida's devastating flooding on the Major Deegan generated momentum for the proposal to daylight Tibbetts Brook.¹¹⁹ The daylighting plan, which is currently in its final planning phase, calls for unburying the stream and reconnecting it to Harlem River through a new naturalized stream bed that will mimic functions of the natural stream that no longer exists.¹²⁰ When completed, this

¹¹³ David Cruz, *How Extreme Flooding of This Bronx Highway Could Have Been Avoided*, GOTHAMIST (Sept. 23, 2021), <https://gothamist.com/news/how-extreme-flooding-bronx-highway-could-have-been-avoided> [<https://perma.cc/P8MK-ZULN>]; *N.Y.C. Community Development Block Grant Disaster Recovery: Hurricane Ida*, N.Y.C., <https://www.nyc.gov/site/cdbgdr/hurricane-ida/hurricane-ida.page> [<https://perma.cc/MUC4-WSMW>].

¹¹⁴ Cruz, *supra* note 113.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Highway Proposed for Van Cortlandt*, N.Y. TIMES, Jun. 12, 1947, at 25 (describing how the planned highway would bisect the community); see Deborah N. Archer, “*White Men’s Roads Through Black Men’s Homes*”: *Advancing Racial Equity Through Highway Reconstruction*, 73 VAND. L. REV. 1259 (2020) (describing the devastating impact that highways had on Black communities).

¹¹⁹ THE KINGSBRIDGE HIST. SOC’Y, *Burying Tibbetts Brook—Construction and Chaos in Kingsbridge ca. 1900* (Nov. 26, 2021, 3:15 PM), <https://kingsbridgehistoricalsociety.org/forums/topic/burying-tibbetts-brook-construction-and-chaos-in-kingsbridge-ca-1900/> [<https://perma.cc/7GVF-7SY9>].

¹²⁰ Lori Atherton, “*Daylighting’ NYC’s Tibbetts Brook: MLA Alumna Helps Unearth Stream from 1912 to Combat Stormwater Overflow*,” STEWARDS MAGAZINE (2023). For up-to-date details on the project, see *Tibbetts Advisory Group Presentations*, N.Y.C. DEP’T ENV’T PROT., <https://www.nyc.gov/site/dep/whats-new/tibbetts-brook-daylighting-project.page> [<https://perma.cc/TEV5-FEAN>] (providing details about the Tibbetts Advisory Committee and meeting notes).

project will eliminate more than 220 million gallons of combined sewer overflow.¹²¹ This will improve water quality and reduce water-born illness from contamination. It will also help manage stormwater runoff and reduce flooding on the Major Deegan Expressway.¹²² Finally, this project provides the opportunity to create a linear park in a community with far too little greenspace, and too much heat and pollution burden.¹²³ Win. Win. Win.¹²⁴

The city now has the rights to all the land needed for the daylighting,¹²⁵ and New York's governor recently committed \$10 million to the project.¹²⁶ Work is expected to start in late 2025.¹²⁷ The project is being done with intense consultation and collaboration with the environmental justice communities along the route.¹²⁸ Additional non-governmental initiatives complement these ongoing consultations to ensure that these Bronx communities speak for themselves. One of the most fascinating ways this is happening is through a series of art projects created under the auspices of City as Living Laboratory—these include art and sound installations, and a community tapestry envisioning the Tibbetts Estuary.¹²⁹

¹²¹ *DEP and NYC Parks Finalize Purchase of Land Needed to 'Daylight' Tibbetts Brook and Extend Putnam Greenway in Bronx*, N.Y.C. DEP'T ENV'T PROT. (Jun. 10, 2024), <https://www.nyc.gov/site/dep/news/24-021/dep-nyc-parks-finalize-purchase-land-needed-daylight-tibbetts-brook-extend-putnam> [<https://perma.cc/9YS6-9C57>].

¹²² *See id.*

¹²³ Jaclyn Spencer & Rebecca Bratspies, *Daylighting Tibbetts Brook: Green Infrastructure as Both a Climate and Environmental Win*, HAPPYECONEWS (Feb. 16, 2024), <https://happyeconews.com/daylighting-tibbetts-brook/> [<https://perma.cc/KP47-J4LN>]; *see also* DoanNguyen, *supra* note 57 (describing heat island effects in the South Bronx); Robert Fanuzzi & Ramdat Singh, *Minutes of the Joint Meeting of the Parks and Recreation and Environment & Sanitation Committees of Bronx Community Board 8*, BRONX CMTY. BD. 8 (Dec. 15, 2021), https://www.nyc.gov/assets/bronxcb8/pdf/environment/Minutes_Joint_ES_with_PR_December_2021.pdf [<https://perma.cc/7BVL-5RAR>].

¹²⁴ For a more critical, intensely personal take on this project, *see* Emily Raboteau, *Daylighting a Brook in the Bronx*, PIONEERWORKS (Oct. 23, 2024), <https://pioneerworks.org/broadcast/daylighting-bronx-emily-raboteau> [<https://perma.cc/2JEF-XLCD>].

¹²⁵ *See* N.Y.C. DEP'T ENV'T PROT., *supra* note 121.

¹²⁶ Izania Gonzalez, *Major Milestone for Tibbetts Brook Daylighting Project: \$10 Million Green Grant Secured for Historic Environmental Plan*, RIVERDALE PRESS (Nov. 4, 2024), <https://www.riverdalepress.com/stories/major-milestone-for-tibbetts-brook-daylighting-project-10-million-green-grant-secured-for,163506> [<https://perma.cc/G3U6-LGMB>].

¹²⁷ Atherton, *supra* note 120.

¹²⁸ *See* N.Y.C. DEP'T ENV'T PROT., *supra* note 120.

¹²⁹ *Rescuing Tibbetts Brook*, CITY AS LIVING LAB'Y, <https://www.cityaslivinglab.org/rescuing-tibbetts> [<https://perma.cc/GF3R-5EQR>]; *The Tibbetts Estuary Tapestry*, CITY AS LIVING LAB'Y, <https://www.cityaslivinglab.org/rescuing-tibbetts/tapestry> [<https://perma.cc/TL34-C2TF>] (explaining the Tibbetts Estuary Tapestry, a green reimagining of this portion of the Bronx based on extensive community input).

C. Lesson #3: Building Retrofit and Local Law 97

New York City has some of the nation's most innovative climate-related legislation targeting both climate mitigation and climate adaptation. Specifically, in 2019, New York City enacted a suite of local laws collectively known as the Climate Mobilization Act or the City's "Green New Deal."¹³⁰ This ambitious legislative package represents New York City's commitment to transforming business as usual in order to achieve the City's 1.5°C Climate Action Plan.

The heart of the Climate Mobilization Act is Local Law 97, which is first-of-its-kind legislation placing carbon emission limits on New York City's privately owned large buildings, both commercial and residential.¹³¹ Under this law, existing buildings over 25,000 square feet must reduce their carbon footprint forty percent by 2030,¹³² and eighty percent by 2050.¹³³ Climate mitigation in New York City focuses on buildings because buildings account for more than two thirds of New York City's greenhouse gas emissions.¹³⁴ The roughly 50,000 large buildings targeted by Local Law 97 emit the lion's share of those greenhouse gases.¹³⁵ Many of the covered buildings have old, inefficient infrastructure and rely extensively on dirty fossil fuels for their electricity.¹³⁶ Changing the way these buildings are heated, cooled, and powered will make a real difference not only in carbon emissions but in the other associated emissions that negatively impact the health and welfare of city residents and the environment.

Local Law 97 instantly catapulted New York City into the vanguard of climate ambition. While the Climate Mobilization Act will not single-handedly reverse the effects of climate change, it "will be the largest emissions reduction policy in the history of New York City or any city anywhere."¹³⁷

How can New York City do this? Knowledge is power. New York City has detailed information about where its greenhouse gas emissions come from because the city has required large building owners to collect and submit standardized data about energy and water use since 2010.¹³⁸ This data, referred to as benchmarking

¹³⁰ Molly Enking, *New York City's Newly Passed Green New Deal, Explained*, GRIST (Apr. 18, 2019), <https://grist.org/article/new-york-citys-newly-passed-green-new-deal-explained/> [<https://perma.cc/FJ2K-C6RC>].

¹³¹ N.Y.C., N.Y., LOCAL LAW 97 (2019); N.Y.C. MAYOR'S OFF. CLIMATE & ENV'T JUST., *Buildings*, <https://climate.cityofnewyork.us/subtopics/buildings/> [<https://perma.cc/F3TK-VPY3>].

¹³² URBAN GREEN COUNCIL, *NYC Building Emissions Law* (Feb. 2023), https://www.urbangreencouncil.org/wp-content/uploads/2023/02/LL97-Summary_2.8.2023.pdf [<https://perma.cc/C3SH-BHJT>].

¹³³ URBAN GREEN COUNCIL, *What is Local Law 97?* (Dec. 2024), https://www.urbangreencouncil.org/sites/default/files/2020.07.09_urban_green_building_emissions_law_summary_revised_11.17.2020.pdf [<https://perma.cc/6VW4-9UVW>].

¹³⁴ N.Y.C. MAYOR'S OFF. CLIMATE & ENV'T JUST., *supra* note 131.

¹³⁵ *One City Built to Last*, N.Y.C. MAYOR'S OFF. 1, 3 (2016), <https://www.nyc.gov/html/builttolast/assets/downloads/pdf/OneCity.pdf> [<https://perma.cc/SXG9-C28R>]; *see also* URBAN GREEN COUNCIL, *supra* note 133.

¹³⁶ MELANIE LAROSA, COMMUNITIES AND THE CLEAN ENERGY REVOLUTION: PUBLIC HEALTH, ECONOMICS, DESIGN, AND TRANSFORMATION 51–52 (2022).

¹³⁷ Rebecca Bratspies, *Public Problems and Private Landowners: Lessons from New York City's Groundbreaking Climate Mobilization Act*, 15 GEO. WASH. J. ENERGY & ENV'T L. 83, 89 (2024) (quoting Local Law 97's primary architect, City Councilmember Costa Constantinides).

¹³⁸ N.Y.C., N.Y., LOCAL LAW 84 (2009); N.Y.C., N.Y., LOCAL LAW 133 (2016).

data, is publicly released every year for buildings over 25,000 square feet—the same buildings that are covered by Local Law 97.¹³⁹ Indeed, another local law requires all covered buildings to prominently display a placard reporting the building's energy efficiency grade ranging from A–F.¹⁴⁰

Local Law 97 is already working better and faster than expected.¹⁴¹ As of January 1, 2024, the overwhelming majority of buildings covered by Local Law 97 (more than ninety percent) had brought their carbon emissions into compliance with Local Law 97's 2024 standards¹⁴²—a level of compliance exceeding even the most optimistic predictions. Buildings are complying more quickly, in part because there is so much low-hanging fruit in terms of energy efficiency for old buildings. Meeting the next deadline in 2030, which has significantly lower emissions targets, will be more difficult. For this reason, the law imposes a significant penalty (\$268 per excess ton of carbon emitted) to ensure that buildings have the incentive to comply.¹⁴³

By 2030, this law is projected to reduce New York City's carbon emissions by six million tons. For perspective, achieving Local Law 97's 2030 targets will be a carbon emissions reduction equivalent to all of San Francisco's emissions,¹⁴⁴ while simultaneously creating 26,700 green jobs.¹⁴⁵ Moreover, by reducing overall energy demands, and promoting the development of green energy to replace fossil-fuel use, Local Law 97 will reduce pollution in the overburdened communities in which the existing fossil fuel energy generating facilities are concentrated.¹⁴⁶ By reducing emissions of the harmful co-pollutants emitted alongside carbon dioxide, Local Law 97 will protect New Yorkers from pollution-related health impacts, preventing up to

¹³⁹ N.Y.C. MAYOR'S OFF. CLIMATE & ENV'T JUST., *NYC Energy & Water Performance Map*, <https://energy.cusp.nyu.edu/#/> [<https://perma.cc/9WLS-R7FS>] (providing an interactive map to make this data more readily available and understandable).

¹⁴⁰ N.Y.C., N.Y., LOCAL LAW 33 (2018); N.Y.C., N.Y., LOCAL LAW 95 (2019).

¹⁴¹ Stephen Lee, *NYC Buildings Complying With Emissions Law Faster Than Expected*, BLOOMBERG L. (Aug. 16, 2023, 4:30 AM), <https://news.bloomberglaw.com/environment-and-energy/nyc-buildings-complying-with-emissions-law-faster-than-expected> [<https://perma.cc/B8NS-E3ME>].

¹⁴² Jennifer A. Kingson, *New York Jump-Starts the "Building Decarbonization" Trend*, AXIOS (Jan. 9, 2024), <https://www.axios.com/2024/01/09/building-decarbonization-local-law-97-new-york-climate-change> [<https://perma.cc/W9MH-C88A>] (reporting that ninety-one percent of covered buildings are in compliance with the 2024 standards).

¹⁴³ N.Y.C. ADMIN. CODE § 28-320.6.

¹⁴⁴ URBAN GREEN COUNCIL, *supra* note 132.

¹⁴⁵ N.Y.C. MAYOR'S OFF. CLIMATE & ENV'T JUST., *Local Law 97: Frequently Asked Questions*, https://be-exchange.org/wp-content/uploads/2024/01/beex_LL97_FAQ_FINAL.pdf [<https://perma.cc/2L5S-EMRC>].

¹⁴⁶ Rebecca Bratspies, *Shutting Down Poletti: Human Rights Lessons from Environmental Victories*, 36 WISC. INT'L L.J. 247, 249–50 (2019) (providing an example of one neighborhood, Astoria, that produces roughly sixty percent of the energy consumed in New York City); see *Dirty Energy, Big Money*, PEAK COALITION (May 2020), https://8f997cf9-39a0-4cd7-b8b8-65190bb2551b.filesusr.com/ugd/f10969_9fa51ccc611145bf88f95a92dba57ebd.pdf [<https://perma.cc/5PKF-DW6G>] (providing a detailed examination of this environmental justice issue).

one hundred thirty premature deaths and one hundred fifty hospital visits each year.¹⁴⁷

IV. CONCLUSION

There is no question that the United States is in the throes of multiple crises at once—environmental, climate, and social. The federal government is not only abandoning its commitment to civil rights, environmental justice, and environmental protection but is actively working to undermine existing programs, laws, and policies. If we are going to move forward at all, it will be because cities and states step up to protect their residents. The policy innovations described in this article can be models for other municipalities to try. Indeed, these examples can be used and improved upon—any place with the courage to innovate can become a climate leader. Therefore, I end this Article with a challenge to its readers—wherever you are, wherever you go, think about how your community can be part of the solution to climate change, to environmental injustice, to social injustice. We really can build a better world together, but first we need to believe that change is possible.

¹⁴⁷ N.Y.C. MAYOR'S OFF. CLIMATE & ENV'T JUST., *supra* note 145145.

THE MYSTERIOUS POWER OF LAND USE LAW: CONSTRUCTING A FRAMEWORK LAW FOR CLIMATE RESILIENT DEVELOPMENT

*By: John R. Nolon and Maureen Hartwell**

ABSTRACT

This Article introduces and explains Climate Resilient Development (CRD), which is relied upon by the Intergovernmental Panel on Climate Change (IPCC) as a primary method of managing climate change. CRD “integrates adaptation measures and their enabling conditions with mitigation to advance sustainable development for all.”¹ CRD illuminates the close relationship between adaptive and mitigative development and land use law, particularly the authority delegated to local governments to regulate and incentivize private land development and conservation. The Article unveils a legal structure that is followed in most states to organize local laws that affect land development; as such, it facilitates the implementation of IPCC policies: a responsive as opposed to prescriptive approach. Case studies of effective CRD strategies are organized by relevant topics into this well-established legal framework for the consideration of municipal leaders and advocates. The conclusion considers the feasibility of the framework law, highlighting the importance of enabling conditions and marking a trail for climate management policy makers and stakeholders to follow.

I. INTRODUCTION: THE IMPERATIVE OF CLIMATE RESILIENT DEVELOPMENT

Working Group II (WG II) of the Intergovernmental Panel on Climate Change stated that its principal strategy for managing climate change is Climate Resilient Development (CRD).² CRD, it states, “integrates adaptation measures and

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¹ See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *Summary for Policymakers*, in CLIMATE CHANGE 2022: MITIGATION OF CLIMATE CHANGE, WORKING GROUP III CONTRIBUTION TO THE SIXTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 39 (Priyadarshi R. Shukla et al. eds., 2022) [hereinafter WG III SPM 2022]; see also INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *Summary for Policymakers*, in CLIMATE CHANGE 2022: MITIGATION OF CLIMATE CHANGE, WORKING GROUP II CONTRIBUTION TO THE SIXTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 39 (Priyadarshi R. Shukla et al. eds., 2022) [hereinafter WG II SPM 2022].

² The IPCC releases Assessment Reports (ARs) every five or six years, detailing the challenges of, and potential solutions for responding to, climate change. While WG II focuses on the impacts of climate change, adaptation, and vulnerability, WG III focuses on mitigation strategies to reduce

their enabling conditions with mitigation to advance sustainable development for all.”³ In other words, CRD proposes the holistic consideration of a community’s history, topography, resources, shortcomings, and more to implement tailored, effective policies. A careful reading of its recent report to policymakers, and that of its companion Working Group III policymakers report, reveals that local governments, wielding their land use regulatory authority, have a major role in managing climate change. WG II identified local land use strategies as effective tools for implementing CRD. The effects of climate change are intrinsically local. Planning and action are needed at the ground level where essential development choices are made and the risks of climate hazards are felt.⁴ The reports note that “embedding effective and equitable adaptation and mitigation in development planning can reduce vulnerability, conserve and restore ecosystems, and enable climate resilient development” and “...the global trend toward urbanization also offers a critical opportunity, in the near-term, to advance climate resilient development.”⁵

In its most recent Summary for Policy Makers, the IPCC included five key elements to CRD: adaptation, mitigation, enabling conditions, resilience, and equity.⁶ Adaptation is defined as the process of adjusting to actual or expected climate and its effects to moderate harm or take advantage of beneficial opportunities.⁷ Mitigation is an anthropogenic intervention to reduce the sources or enhance the sinks of greenhouse gasses.⁸ Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.⁶ Achieving sustainable development for all requires that CRD provisions are equitable. Equity is concerned with fairness in the way people are treated and is based on societal values.⁹

Resilience is defined by the IPCC as the capacity of social groups, economic structures, and ecosystems to cope with a hazardous event, trend, or disturbance. Resilience is tantamount to responding or reorganizing in ways that maintain the system’s essential function, identity, and structure as well as biodiversity in cases of ecosystems while also maintaining the capacity for adaptation, learning, and transformation.¹⁰

greenhouse gas emissions and combat climate change. WG II examines the effects of climate change while WG III finds ways to address these effects. WG II’s Sixth Assessment. *See* WG III SPM 2022, *supra* note 1, at 39; *see generally* WG II SPM 2022, *supra* note 1.

³ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *Summary for Policymakers*, in CLIMATE CHANGE 2022: IMPACTS, ADAPTATION, AND VULNERABILITY, CONTRIBUTION OF WORKING GROUP II TO THE SIXTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 28 (H.-O. Pörtner et al. eds., Cambridge Univ. Press 2022) [hereinafter WG II AR6].

⁴ *See id.* at 2658; WG II SPM 2022, *supra* note 1, at B.2 & D.1 (noting that “current unsustainable development patterns are increasing exposure of ecosystems and people to climate hazards” and “pursuing climate resilient development focuses on ... where people and ecosystems are co-located....”).

⁵ WG II SPM 2022, *supra* note 1, at D.1.3. & D.3.

⁶ *Id.*, at D.1–D.5.3.

⁷ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2023: SYNTHESIS REPORT 120 (Hoesung Lee & Jim Skea eds., 2023) [hereinafter 2023 SYNTHESIS REPORT].

⁸ *Id.* at 126.

⁹ *Id.* at 124.

¹⁰ *See id.* at 128.

The successful implementation of CRD strategies depends on whether the necessary enabling conditions are present. Enabling conditions are “conditions that are key for implementing, accelerating, and sustaining adaptation in human systems and ecosystems.”¹¹ These include political commitment and follow-through, institutional frameworks, policies and instruments with clear goals and priorities, enhanced transparency by government and corresponding knowledge of constituents, mobilization of and access to adequate financial resources, monitoring, evaluation, and inclusive governance processes.¹² Enabling conditions often determine whether a particular adaptation option may be implemented. Feasibility considers the potential for an adaptive measure to be implemented and maintained successfully.¹³

II. THE ESSENTIAL MEANING OF DEVELOPMENT

Development, as used in this Article, refers to land development and preserved open space by private landowners that define how communities grow. This is development that provides housing, retail goods, offices, social services, manufacturing, and other types of building with an eye toward the protection of ecosystems. WG II refers to this as urbanization, which it states, “offers a critical opportunity in the near term to advance climate resilient development.”¹⁴

Local governments have at their disposal the tools necessary to foster the shift from car-dependent, single-family neighborhoods to transit-oriented urban living, to increase energy efficiency in buildings and to reduce development pressures on carbon-sequestering open space.¹⁵ And when the impacts of municipalities’ regulations, policies, and education programs are aggregated, they collectively represent a significant, if not dominant, impact on domestic greenhouse gas (GHG) reductions.¹⁶

In addition to their extensive reports, each IPCC Working Group produces a corresponding Summary for Policymakers (SPM). SPMs are condensed documents that provide policy information and directives for adapting to and mitigating climate change. The WG II SPM highlights that CRD is more effective when “it is responsive to regional and local land use development and adaptation gaps, and addresses the underlying drivers of vulnerability.”¹⁷ As a means to implement CRD, WG II discusses the role of land use controls: “[p]lanning for CRD can support both adaptation and decarbonization via effective land-use, promoting

¹¹ See WG II SPM 2022, *supra* note 1, at 27.

¹² *Id.*

¹³ See WG II AR6, at 2909.; *see also* 2023 SYNTHESIS REPORT, *supra* note 6, at C.2.

¹⁴ It refers the ability of actors involved in urban planning to shape human settlements: “[I]ntegrated inclusive planning and investment in everyday decision-making about urban infrastructure, including social, ecological and grey/physical infrastructures, can significantly increase the adaptive capacity of urban and rural settlements.” See WG II SPM 2022, *supra* note 1, at D.3.

¹⁵ See *infra* Part III.

¹⁶ *Id.*

¹⁷ WG II SPM 2022, *supra* note 1, at D.3.2.

resilient and low-carbon infrastructure; protecting biodiversity and integrating ecosystem services, assuming advancing just and equitable development processes.”¹⁸

The SPM of WG III, in turn, highlights the importance of land use development in mitigating emissions as follows:

The potential and sequencing of mitigation strategies to reduce GHG emissions will vary depending on a city’s land use, spatial form, development level, and state of urbanization. Strategies for established cities to achieve large GHG emissions savings include efficiently improving, repurposing, or retrofitting the building stock, targeted infilling, and supporting non-motorized (e.g., walking or bicycling) and public transport. Rapidly growing cities can avoid future emissions by co-locating jobs and housing to achieve compact urban form and by leapfrogging or transitioning to low-emissions technologies.¹⁹

WG III also refers to “enhancing carbon uptake and storage in the urban environment, for example through bio-based building materials, permeable surfaces, green roofs, trees, green spaces, rivers, ponds, and lakes.”²⁰

WG III outlined several strategies for saving local GHGs including (1) improving, repurposing, or retrofitting the building stock; (2) supporting walking, biking, and public transit; (3) targeting infilling and compact urban form; (4) using bio-based building materials; (5) increasing permeable surfaces; (6) adding green roofs; (7) planting trees; (8) building green spaces; and (9) improving rivers, ponds, and lakes, among others. Land use law can achieve all these strategies and more.²¹ Local governments can adopt, enforce, and incentivize CRD strategies to control and shape land use through regulation, capital spending, and policy.

III. THE MYSTERIOUS POWER OF LOCAL LAND USE LAW

The authority to adopt land use plans and zoning regulations is delegated to local governments in most states through planning and zoning enabling acts adopted by state legislatures.²² Many states have supplemental acts delegating other types of land use controls to local governments to protect, for example, environmental functions or public health.

Land use enabling laws generally are broadly construed to empower localities to adopt innovative and flexible land use regulations.²³ One of the purposes of local

¹⁸ *See id.*

¹⁹ WG III SPM 2022, *supra* note 1, at C.6.2. Retrofitting building stock refers to the process of upgrading existing buildings by incorporating new technologies and materials to improve performance and, in some cases, climate resilience. Targeted infilling, discussed in greater detail later in this Article, refers to the strategic development of vacant or underutilized land within existing urban areas to build “up” rather than “out.”

²⁰ *See id.*

²¹ WG III SPM 2022, *supra* note 1, at C.6.2.

²² JOHN R. NOLON, CHOOSING TO SUCCEED: LAND USE LAW & CLIMATE CHANGE, 23–26 (2021).

²³ *See generally* John R. Nolon, *Death of Dillon’s Rule: Local Autonomy to Control Land Use*, 36 J. LAND USE & ENV’T L. 7 (2020).

zoning laws is to provide for “the most appropriate use of land,” a broad objective indeed.²⁴ This phrase was contained in the original model zoning enabling act and is found in the law of most states.²⁵ In upholding the constitutionality of land use restrictions, the Supreme Court said “...while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise.”²⁶

State statutes may require all land use regulations, including zoning, subdivision and site plan regulations, and all other regulations affecting the use of private land, to conform to a comprehensive plan.²⁷ When a locality’s comprehensive plan calls for innovative strategies to meet emerging conditions such as climate change, conformance of land use regulations to plan objectives helps to meet due process, *ultra vires*, equal protection, takings, and other landowner challenges.²⁸ The interplay among these facets of local land use laws has enabled it to evolve as new challenges have arisen. Over the last fifty years, localities have created regimes such as urban redevelopment, local environmental law, smart growth, and sustainable development.²⁹

Many municipalities have turned their attention to facilitating development that is mitigative, adaptive, and resilient. Such development fosters climate resilient development. Among their CRD achievements are biophilic design, environmental housing, high albedo roofs, low carbon construction, climate resilient retrofits, heat island mitigation, carbon neutral building assessments, climate justice plans, living shorelines, shoreline protection, and anti-displacement, just to name a few achievements. Part V of this article discusses these accomplishments in greater detail, providing illustrative case studies.

IV. THE STRUCTURE OF LAND USE LAW – THE FRAMEWORK EMERGES

Municipalities regulate private sector behavior and establish administrative boards and procedures governing land use by the formal adoption of laws and

²⁴ *See id.* at 13.

²⁵ *See id.* at 10.

²⁶ *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926).

²⁷ **New York:** Under Town Law § 272-a, all town land use regulations must be in accordance with a comprehensive plan adopted pursuant to this section. **Washington:** The Growth Management Act mandates that counties and cities adopt comprehensive plans, and all development regulations must be consistent with these plans. **Oregon:** The Land Conservation and Development Act requires cities and counties to prepare comprehensive plans, with all land use regulations and decisions needing to comply with these plans. *See* N.Y. Town Law § 272-a (McKinney 2024); *see also* Wash. Rev. Code § 36.70A.020 (2024); *see also* Or. Rev. Stat. §§ 197.005–197.860 (2024).

²⁸ *NOLON*, *supra* note 21, at 215-217.

²⁹ *See* Jonathan D. Weiss, *Preface Smart Growth and Affordable Housing*, 12 SMART GROWTH & AFFORDABLE HOUSING 165-173 (Winter 2003) ; *see generally* CENTER FOR GLOBAL METROPOLITAN STUDIES ET AL., *THE FUTURE OF SHRINKING CITIES: PROBLEMS, PATTERNS AND STRATEGIES OF URBAN TRANSFORMATION IN A GLOBAL CONTEXT* (Karina Pallagst et al. eds., 2009).

regulations. Local laws are codified into municipal codes that are organized, in most cases, alphabetically, with Animal Control, for example, found in the beginning of the municipal code and Zoning toward the end. Often the code is organized by chapters with Animal Control being found in Chapter 3, for instance, and Zoning in Chapter 125.³⁰

Municipalities are diverse, have unique land use concerns and opportunities, and enjoy significant discretion in organizing their codes as to form and substance based on their concerns. There is, however, a common structure.³¹ For the purpose of this Article, this structure, or framework, includes the following nine elements relevant to furthering CRD:

1. The comprehensive plan
2. Special topic or area plans
3. Zoning use and dimensional requirements
4. Supplemental substantive zoning provisions
5. Principal land use boards and officers – powers and duties
6. Special interest land use boards – powers and duties
7. Environmental chapters in municipal code
8. Public health chapters in municipal code
9. Other municipal code chapters regulating land use³²

Altogether, the municipal code and advisory plan provisions related to land use can exceed two hundred and fifty pages in many communities and even double that amount in others³³. State legislatures seldom require localities to follow a certain order, to be consistent in the location of certain types of provisions, or to require regulations of land use to be clustered consistently in discrete municipal code

³⁰ There are other methods used to describe the formal parts of the municipal code such as dividing its substantive parts into Titles, Articles, etc. For the CRD Framework Law, we have chosen the chapter format since it is the most prevalent nomenclature.

³¹ One advantage of the framework law is that it is responsive to local practices since it fits new regulations into a legal structure with which local stakeholders are familiar. Other efforts over the decades have been more prescriptive requiring full-on changes in the local land use regulatory structure. This approach can be seen as paternalistic and not responsive, thus disrespectful and less likely to be adopted.

³² Pamela Vegna, *Achieving Climate-Resilient Development at the Local Level: Does a Nationally Consistent Legal Framework Exist to Facilitate Adoption of CRD Best Practices?*, PACE ENV'T L. REV. BLOG (Jan. 15, 2025), <https://pelr.blogs.pace.edu/2025/01/15/achieving-climate-resilient-development-at-the-local-level-does-a-nationally-consistent-legal-framework-exist-to-facilitate-adoption-of-crd-best-practices/> [https://perma.cc/JNU2-BEWS].

³³ Julie Lovelace, *Is it Time for a Legal Review of your Code of Ordinances?*, MUNICODE, <https://www.municode.com/code/page/it-time-legal-review-your-code-ordinances> [https://perma.cc/R24E-CZBY]; see *Zoning Text*, NYC PLANNING, <https://www.nyc.gov/site/planning/zoning/access-text.page#:~:text=The%20text%20of%20the%20Zoning,the%20enhanced%20online%20Zoning%20Resolution> [https://perma.cc/K5HP-HXU3]; Tara Astbury, *City Ordinance vs. City Code: What's the Difference?*, ESCRIBE (Mar. 27, 2024), <https://www.escribemeetings.com/blog/city-ordinance-vs-city-code/#:~:text=An%20ordinance%20is%20a%20specific,organized%20systematically%20by%20subject%20matter> [https://perma.cc/2BF4-N934].

locations.³⁴ Subdivision regulation, for example, may be found in the supplemental section of the zoning chapter or in a separate chapter of its own. Site plan regulations and special use provisions tend to be in the zoning chapter itself and are seen as supplemental substantive zoning provisions.

From year to year, over the decades that the community has been adopting land use regulations, the circumstances can change drastically, political situations evolve, dozens of elected legislators and volunteer land use board members come and go along with municipal attorneys with ideas of their own about how land use regulations should be structured. Nonetheless, the nine structural components listed above will be found somewhere in the municipal code or departmental websites. They will be used in this Article to build out the Framework Law for locating exemplary CRD language included in Part V.

1. **The comprehensive plan:** The plan is advisory in nature, not regulatory. As such, it is not a local law. Generally, plans are not located in the municipal code, but rather found on the municipal website, often in the link to the appropriate city agency such as the building, planning, or economic development department. They typically have a notation that they were adopted on a certain date in compliance with state procedures, which in most cases require legislative approval following public notice and one or more public hearings. Once adopted, formally adopted plans guide the amendment and addition of land use laws and, as a result, constitute the policy foundation of the CRD Framework law.
2. **Special topic or area plans:** Communities that adopt truly comprehensive plans will tend to integrate more detailed planning specifications and procedures into their comprehensive plan for the sake of coordinating topics such as stormwater management or areas with special characteristics such as waterfronts, extensive wetlands, eco-system rich open space areas, vulnerable coastal areas, transit-oriented neighborhoods, and disaster-prone districts. Other communities will adopt stand-alone special plans to guide development in these targeted areas. However organized, special plans, too, are not regulatory and thus are located on departmental webpages rather than neatly organized in the municipal code. These special plans are part of the policy platform that supports the adoption of higher tiers of land use regulation.
3. **Zoning chapter of municipal code – use and dimensional requirements:** Zoning, historically, refers to the creation of a number of different districts or zones, the adoption of permitted land uses, and the dimensions required such as maximum building heights, lot coverage, setbacks, and other

³⁴ WORKING WITH STATE LEGISLATURES: A GUIDE FOR MILITARY INSTALLATIONS AND STATE LEGISLATURES, NAT'L CONF. OF STATE LEGS. 10, https://www.repi.mil/Portals/44/Documents/Primers/Primer_StateLegislatures.pdf [<https://perma.cc/B9L2-UW6S>].

dimensional characteristics that will differ from zone to zone.³⁵ Such regulations must be in conformance with the comprehensive plan.

4. **Supplemental substantive land use provisions:** Regulations that are supplemental to the traditional district use and dimensional provisions may be added to the zoning chapter of the municipal code or be added as separate code chapters. Subdivision regulations are often found in a separate chapter, while special use permit provisions, along with erosion and sedimentation controls, and restrictions limiting excavation, tree harvesting, or other standards limiting environmental harms may be in the zoning chapter itself.
5. **Principal land use boards – powers and duties:** The requirements for development contained in zoning and land use laws are enforced through an administrative review process conducted by a planning or zoning board. Such agencies can be empowered by their local legislatures to impose conditions on their approval of developer and landowner proposals, including conditions that further CRD. These boards may also be empowered to provide incentives for projects that further critical policies such as climate change mitigation or adaption. Incentives can include awarding greater density or speeding up the review process.
6. **Special interest land use boards - powers and duties:** Land use regulation can be expanded to govern details such as architectural design, wetlands, waterfronts, or historic districts. Some municipalities create special review boards to ensure that developments comply with these additional requirements. These boards can be given advisory or permitting authority over projects that are within their jurisdiction. This process can be used in some instances to further CRD objectives such as ensuring that developments are resilient by preserving or expanding wetlands or by enhancing vegetation that provides biological sequestration.³⁶
7. **Environmental chapters in municipal code:** Using delegated authority to protect environmental functions, local governments can add a chapter to their municipal code concerning such matters, some of which can affect the use of land or the construction of buildings. Stormwater management provisions, in lieu of being added as a supplemental regulation in the zoning chapter, could be found in its own chapter entitled Stormwater Management, which regulates development projects.

³⁵ *Zoning Text*, *supra* note 32; *see generally* Michael Chandler & Gregory Dale, *Zoning Basics*, 42 PLANNING COMM'RS J. 13 (2001); *see generally* Michael Allan Wolf, *A Common Law of Zoning*, 61 ARIZ. L. REV. 771 (2019).

³⁶ Biological sequestration is the process whereby plants and ecosystems absorb and store carbon dioxide. *See* U.S. Geological Survey, *Biological Carbon Sequestration*, U.S. Geological Survey (Apr. 24, 2025), <https://www.usgs.gov/media/images/biological-carbon-sequestration#:~:text=Detailed%20Description,or%20in%20extensive%20root%20systems>.

8. **Public health chapters in municipal code:** Similarly, using delegated authority to protect the physical or mental health of the public, local governments can add a chapter to their municipal code to affect the use of land or the construction of buildings. Noise abatement regulations might, for instance, be found as one section of the Public Health chapter of the code.
9. **Other municipal code chapters relevant to land use:** In addition, municipalities can use their broad land use authority or power to protect the public health, safety, and welfare to limit the location of junkyards, high emission facilities, or polluting facilities. When they do, they may add a separate chapter to their codes under a relevant title such as “Junkyards,” which can be considered land use regulation and a method of furthering CRD such as equity or adaptation. Similarly, they might adopt water conservation standards in a separate “Water Conservation” chapter of their municipal code.

V. BUILDING OUT THE FRAMEWORK LAW: TOPICS AND CASE STUDIES³⁷

Based on results of student research,³⁸ twelve substantive topics have been selected for this Article to fill in the CRD Framework Law. The topics are:

1. Local climate action plans,
2. Targeted infill and adaptive reuse,
3. Low-carbon buildings,
4. Wildfire mitigation,
5. Sea level rise,
6. Vegetated urbanism,
7. Parking and pavement,
8. Inland flooding,
9. Distributed energy,
10. Disaster mitigation and hazard management,
11. Public health, and
12. Water conservation.

³⁷ The author would like to thank the following students for their contributions to this section of the article: Sophie Coassin, Hannah Dauray, Lauren Palmer, Evi Patterson, Pamella Vegna, Sebastian Boivin, Emily Petermann, Stephanie Panicali, Alysia LeComte, Joann Lenart, and Bianca Mazarella.

³⁸ Over three semesters, fifty land use scholars worked with the Land Use Law Center scanning the nation at the local level to find and record case studies of land use laws that embodied CRD components and furthered CRD objectives. The students found that these case studies fit into twelve substantive categories. “The legal academy has been turning to empirical work in recent years to get a better handle on what the world looks like and the impacts of legal change and legal reform,” Bob Needham, *Empiricism on the Rise*, 67 *LAW QUADRANGLE: NOTES FROM MICH. L.* 26 (Winter 2024-2025) (quoting J.J. Prescott).

This Article describes and discusses some examples of CRD that have emerged within some of these topic areas and illustrates where they fit within the Framework structure. A brief description of each topic is provided below with references to recently adopted land use laws.

A. Local Climate Action Plans: New York City CAPs – *Special Topic Plan*

Local governments have sought to formulate long-term sustainability strategies through climate action plans (CAPs), which deal with land use as well as other local government policies.³⁹ Like state-level climate action plans, municipal CAPs generally include: a GHG emissions inventory; realistic emissions reduction targets based on this inventory and an analysis of energy savings opportunities; and strategies and policies to meet these emissions reductions goals.⁴⁰ CAPs are inherently special plans because they are documents dedicated to specific goals like GHG reductions.

In November 2021, New York City amended its administrative code in relation to the creation of its citywide Climate Adaptation Plan.⁴¹ The law requires that the Office of Long-Term Planning and Sustainability (OLTPS) develop and post a CAP at least every ten years.⁴² New York City established the OLTPS in 2008 by amending the New York City charter and the administrative code of the city of New York in relation to the office of operations, the office of environmental coordination, and an office of long-term planning and sustainability.⁴³ The city created OLTPS to develop and implement PlaNYC, the city's strategic plan through 2030.⁴⁴

B. Targeted Infill and Adaptive Reuse: Surprise, Arizona – *Supplemental Substantive Zoning Provisions*

Preserving open land is part of an overall community development and conservation strategy.⁴⁵ Experience proves that when community leaders develop a balanced strategy for development and conservation—or Smart Growth—both

³⁹ See generally Ellen Bassett & Vivek Shandas, *Innovation and Climate Action Planning*, 76 J. OF AM. PLANNING ASS'N 435 (2010).

⁴⁰ See *id.*

⁴¹ See *AdaptNYC*, CITY OF N.Y. MAYOR'S OFF. OF CLIMATE & ENV'T JUST., <https://climate.cityofnewyork.us/initiatives/adaptnyc/> [<https://perma.cc/H3TD-FBBE>]; see also *Off. of Long Term Planning and Sustainability Job Listing*, CITY OF N.Y. MAYOR'S OFF., https://www.nyc.gov/html/oltps/downloads/pdf/senior_policy_advisor_notice_061614.pdf [<https://perma.cc/2H4Z-5X4N>].

⁴² N.Y.C., N.Y., ADMIN. CODE § 24-808 (2025), available at <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCAadmin/0-0-0-207400>.

⁴³ See *id.*

⁴⁴ *PlaNYC*, CITY OF N.Y. MAYOR'S OFF. OF CLIMATE & ENV'T JUST., <https://climate.cityofnewyork.us/initiatives/planyc-getting-sustainability-done/> [<https://perma.cc/PCG3-9UPG>] (explaining that PlaNYC is the city's comprehensive plan). While PlaNYC is a comprehensive sustainability plan, it is not a traditional comprehensive plan that covers all aspects of city development but rather focuses on sustainability and climate action. *Id.*

⁴⁵ See generally JOHN R. NOLON, *PROTECTING THE ENVIRONMENT THROUGH LAND USE LAW: STANDING GROUND* Ch. 5 (2014).

objectives are more easily achieved.⁴⁶ Simply acquiring and regulating land cannot prevent sprawl and its negative side effects; an effective approach to concentrating market pressures for development in appropriate places is required.⁴⁷ Local comprehensive plans routinely call for balanced land use patterns with development and conservation occurring in appropriate places. Proper environmental planning requires this balance.⁴⁸

Surprise, Arizona's Surprise Heritage District (SHD) is a zoning district that seeks to encourage redevelopment while preserving historical character in the city's Original Town Site. The city's Infill Incentive District Plan provides financial incentives to promote both residential and commercial development.⁴⁹ Sec. 109-48 states: "[a]ny new residential development on parcels zoned either as SHD/RO or as SHD/CO shall receive a 100-percent waiver of City of Surprise development impact fees."⁵⁰ Incentivizing developers with fee waivers frees up their funds for construction in denser areas that may be more expensive due to higher land costs, infrastructure challenges, or increased competition for resources that might not exist in undeveloped areas. Thus, this project combats urban sprawl by encouraging development in areas that have existing commercial markets and existing infrastructure, including sewers, roads, and public transit services.

C. Low-carbon Buildings: Boulder, Colorado – *Other Municipal Code Chapters Regulating Land Use*

Buildings that accomplish multiple sustainability objectives have become known as low-carbon buildings or green buildings.⁵¹ Low-carbon buildings employ construction techniques, building designs, and operational systems that save water, reduce lighting needs, use recycled and low-carbon building materials, or create a more healthful indoor environment, for example.⁵² They may also incorporate renewable energy sources such as individual building solar systems and wind turbines.⁵³

⁴⁶ See *id.* Smart growth is an overall approach to development that encourages a mix of building types and uses, diverse housing and transportation options, development within existing neighborhoods, and robust community engagement. See also *What Is Smart Growth?*, SMART GROWTH AM., <https://smartgrowthamerica.org/what-is-smart-growth/> [<https://perma.cc/C3R2-QP7D>].

⁴⁷ NOLON, *supra* note 44, at Ch. 5.

⁴⁸ See *id.*

⁴⁹ See *Surprise Heritage District*, CITY OF SURPRISE, <https://surpriseaz.gov/263/Surprise-Heritage-District> [<https://perma.cc/R7YY-UNLW>] (noting the Infill Incentive District Plan was adopted under Ordinance 2016-14).

⁵⁰ SURPRISE, ARIZ., MUNICIPAL CODE § 111-1.3 (2024), available at https://library.municode.com/az/surprise/codes/municipal_code?nodeId=PTIILADEOR_CH1111 NINDI.

⁵¹ See generally Ye Li, et al., *A Review on the Policy, Technology and Evaluation Method of Low-Carbon Buildings and Communities*, 16 ENERGIES 4 (2023).

⁵² See *id.*

⁵³ See *id.*

Boulder, Colorado's building code now requires that construction projects meet a threshold level of embodied carbon credits in addition to other electric and building credit requirements.⁵⁴ Embodied carbon credits consider building materials and their relative benefit or burden to the overall embodied carbon inventory within the city.⁵⁵ The code lays out considerations for materials such as lumber, steel, and concrete.⁵⁶ To achieve credits for reduction of embodied carbon, the code states:

“...all materials or products of the type chosen to meet this credit option used in the construction of the building shall meet the requirements of this section. The construction documents shall identify the products proposed for the construction of the building and demonstrate compliance of the proposed products with the requirements of this section.”⁵⁷

The code goes on to state that a minimum of three materials or products selected from the options outlined must be chosen to achieve the credits.⁵⁸ These materials include products like embodied carbon in insulation, interior finishes, floor covering, and roofing, among others.

The final section of the code requires a “whole building life-cycle assessment.”⁵⁹ The code states that the assessment must demonstrate a minimum ten percent reduction for at least three of six impact categories. The six categories for reductions include: (1) global warming potential (greenhouse gases); (2) depletion of the stratospheric ozone layer; (3) acidification of land and water sources; (4) eutrophication; (5) formation of tropospheric ozone; and (6) depletion of nonrenewable energy resources.⁶⁰ By providing varying reductions options, the code gives developers some flexibility to meet the regulation.

D. Wildfire Mitigation: Maui, Hawaii – *Other Municipal Code Chapters Regulating Land Use*

Wildfires are increasingly destroying homes in the wildland-urban interface.⁶¹ With projections of climate change and housing growth potentially

⁵⁴ BOULDER, COLO., ENERGY CONSERVATION CODE CH. 4, COM. ENERGY EFFICIENCY (2024), available at <https://codes.iccsafe.org/content/COBECC2024P1/chapter-4-ce-commercial-energy-efficiency>. Embodied carbon refers to the GHG emissions associated with the lifecycle of a product, encompassing, in some cases, the extraction, manufacturing, transportation, installation, maintenance, and disposal. In the context of building construction, embodied carbon considers how to incorporate low-carbon processes from start to finish.

⁵⁵ *See id.*

⁵⁶ *See id.*

⁵⁷ *Id.* § C406.3.8.

⁵⁸ *Id.* §§ C406.3.8.1–C406.3.8.11 (noting alternatively, one selection from the options in §§ C406.3.8.1 through C406.3.8.11 and compliance with § C406.3.9.12 will also achieve the credit).

⁵⁹ *See id.* § C406.3.8.12.

⁶⁰ *Id.* § C406.3.8.12.

⁶¹ *See* Alexandra D. Syphard, Avi Bar Massada, Van Butsic, & Jon E. Keeley, *Land Use Planning and Wildfire: Development Policies Influence Future Probability of Housing Loss*, PLOS (Aug. 14, 2013). *See also* *What Is the Wildland Urban Interface (WUI)?*, U.S. FIRE ADMIN., <https://www.usfa.fema.gov/wui/what-is-the-wui> [<https://perma.cc/FHU7-KY2X>]

exacerbating the threat of wildfire to homes and property, effective fire-risk reduction alternatives are needed as part of a comprehensive fire management plan.⁶² Land use planning can yield policies that avoid exposure to wildfires altogether through the informed placement of new residential structures.

Maui County's Fire Code requires clearing vegetation that may pose a risk of causing or spreading wildfires.⁶³ This code gives control to Maui's Fire Prevention Bureau to determine which vegetation should be removed. Section 10.13.10, Exterior Vegetation, reads:

“Cut or uncut weeds, grass, vines, and other vegetation shall be removed when determined by the AHJ [Authority Having Jurisdiction] to be a fire hazard. When the AHJ determines that total removal of growth is impractical due to size or environmental factors, approved fuel breaks shall be established.”⁶⁴

The code specifies that, to maintain an effective firebreak, it is necessary to remove flammable vegetation from areas that are within thirty feet of buildings and structures.⁶⁵ If conditions worsen, the scope can be expanded to within one hundred feet of buildings.⁶⁶ However, the code also includes some exceptions, such as leaving single trees that do not pose a risk of spreading fire.⁶⁷ Finally, Maui County is implementing educational campaigns to inform the public of this code and underscore its importance.⁶⁸

[hereinafter U.S. FIRE ADMIN.] (noting that the WUI is the zone of transition between unoccupied land and human development. It is the line, area or zone where structures and other human development meet or intermingle with undeveloped wildland or vegetative fuels).

⁶² See U.S. FIRE ADMIN, *supra* note 60.

⁶³ *Maui County Fire Code*, MAUI COUNTY GOV'T § 16.04D.230 (2024), available at https://library.municode.com/hi/county_of_maui/codes/code_of_ordinances?nodeId=TIT16BUCO_CH16.04DFICO_16.04D.230SU10.13.10AM.

⁶⁴ See *id.* §§ 10.13.10.1 and 10.13.10.2.

⁶⁵ See *id.* § 10.13.10.2.1. The code creates clearance of brush provisions as follows: “Clearance of brush. Persons owning, leasing, controlling, operating or maintaining buildings or structures in, upon, or adjoining hazardous fire areas, and persons owning, leasing or controlling land adjacent to such buildings or structures, shall at all times: 1. Maintain an effective firebreak by removing and clearing away flammable vegetation and combustible growth from areas with 30 feet of such buildings or structures. 2. Maintain additional fire protection or firebreak by removing brush, flammable vegetation and combustible growth located within 30 feet from such buildings or structures, when required by the AHJ because of extra-hazardous conditions causing a firebreak of only 30 feet to be insufficient to provide reasonable fire safety the AHJ may require the removal for up to 100 feet.”

⁶⁶ See *id.*

⁶⁷ See *id.*

⁶⁸ The Fire Education section is responsible for developing and implementing programs that will increase the public's awareness of fire safety. This includes an annual fire safety program for Maui

E. Sea Level Rise: South San Francisco, California – Supplemental Substantive Zoning Provision

Rising sea levels in the United States will greatly affect existing communities built along coasts and estuaries that are at, or close to, sea level.⁶⁹ These communities have existing buildings, rail lines, roads, and other infrastructure at risk, not only from the rising water level, but also from the storm surges and other natural disasters associated with climate change.⁷⁰ Sea level rise will erode beaches; drown marshes and wetlands; damage barrier islands, habitat, and ecological processes; cause saline intrusion into freshwater ecosystems and groundwater; flooding or inundation of low-lying areas; and damage to private and public property and infrastructure.⁷¹

The South San Francisco Zoning Code Update, adopted in 2022, provides a comprehensive framework for managing land use and development within the city.⁷² The Floodplain/Sea Level Rise (SLR) Overlay District Map helps protect against sea level rise by enforcing regulations such as site clearance requirements, prohibited uses, and specific development standards.⁷³ The SLR map identifies current flood zones and areas at risk of rising sea levels.⁷⁴ The zoning code also offers floor area ratio (FAR) incentives to encourage developers to adopt community benefit programs, including sea level rise adaptation initiatives.⁷⁵

Section 20.395.001 establishes the South San Francisco Community Benefits Program by which the City may increase the value of private property by granting additional development capacity (i.e. a FAR bonus) in exchange for community benefits.⁷⁶ The program enables the city to derive greater benefit for the broader community from the granting of planning entitlements than would be otherwise possible through base zoning district standards. Community benefits include enhanced open spaces, enhanced connectivity, green buildings, social service uses, expanded transportation demand management, on-site and off-site affordable housing, or sea level rise adaptation measures.⁷⁷

Benefit fees collected in accordance with Section 20.395.003 (“Review and Approval”) may fund one or more of the benefits.⁷⁸ The code provides that contributions to or construction of district-wide sea level rise mitigation measures constitute community benefits. Such contributions may include levees, sea walls and

County schools. See Fire Education, MAUI COUNTY GOV'T, <https://www.mauicounty.gov/1806/Fire-Education> [<https://perma.cc/AX3B-RCJU>]; see also Fire Prevention Bureau, MAUI COUNTY GOV'T, <https://www.mauicounty.gov/1465/Fire-Prevention-Bureau> [<https://perma.cc/5BD4-BCVL>].

⁶⁹ See generally Anny Cazenave & Goneri Le Cozannet, *Sea Level Rise and Its Coastal Impacts*, 2 EARTH'S FUTURE (2014).

⁷⁰ See *id.* (explaining the danger of sea level rise to coastal communities and their infrastructure).

⁷¹ See *id.*

⁷² See SOUTH S.F., CAL., ZONING CODE (2022), available at <https://ecode360.com/43450037>.

⁷³ See *id.* § 20.180.

⁷⁴ See *id.*

⁷⁵ *Id.* § 20.395.001.

⁷⁶ *Id.*

⁷⁷ See *id.*

⁷⁸ *Id.* § 20.395.004.

detention basins, creek restoration and improvements, and landscaping efforts aimed at “supporting biodiversity and improving resilience in impacted areas.”⁷⁹

F. Vegetated Urbanism: Tallahassee, Florida – *Environmental Chapter*

City planners concerned with green infrastructure calculate the current green space coverage so that an adequate percentage of the land is sheltered and shaded, with its soils held intact and its ability to absorb and retain water preserved, if not enhanced.⁸⁰ Under the urban tree canopy and between intense zones of green, small stretches of vegetated spaces work to connect streams and channels, provide paths for people and species, direct and control the flow of water, and provide places along the way for rest and play.⁸¹ The elements of green infrastructure can include green roofs, planters, rainwater harvesting devices, street trees, preserved open space on building sites, natural vegetated corridors and swales, permeable paved areas accented with green features, detention basins, green building facades, and greened medians and edges along streets, paths, and rail lines.⁸²

Chapter 5 of Tallahassee’s Land Development Code requires certain protections for tree canopy and other removal standards. Section 5-83 (f), *Reforestation Requirements*, states:

“[a]ll sites, except for individual lots being developed with one single-family, duplex, or triplex, and residential subdivisions that do not exceed four dwelling units per acre shall provide, upon completion of development activities, a minimum number of trees equivalent to a ratio of 40 tree credits for each acre proposed for development.”⁸³

The code also provides that, if the total number of trees to be replanted is not feasible on the development site, then

“...the applicant may enter into an agreement with the city, as approved by the director, to plant the excess trees on an approved public site or to provide the monetary equivalent to the city for use in public landscaping projects.”⁸⁴

⁷⁹ *Id.*

⁸⁰ See generally JOHN R. NOLON, *PROTECTING THE ENVIRONMENT THROUGH LAND USE LAW: STANDING GROUND* 262 (2014).

⁸¹ See *id.*

⁸² See *id.*

⁸³ i.e., total tree preservation credits plus tree replanting credits shall be equal to or greater than 40 credits per acre proposed for development.

⁸⁴ TALLAHASSEE, FLA., *LAND DEVELOPMENT CODE*, § 5-83 (f) (2020), available at https://library.municode.com/fl/tallahassee/codes/land_development_code?nodeId=LADECO_C_H5ENMA.

The code additionally creates a “critical protection zone,” (CPZ) defined as “that area surrounding a tree within a circle described by a radius of one foot for each inch of the tree’s diameter at breast height.”⁸⁵ The code seeks to protect the root systems of individual trees that are contained within the CPZ from impacts associated with development activity. Pursuant to this mission, the code states:

“The critical protection zone of every protected tree not permitted for removal shall be protected from activities that may injure the tree, including, but not limited to, cut and fill activities, building pad placements, roadbed construction, construction of material storage, driving or parking heavy equipment, or trenching.”⁸⁶

By drawing on restrictive zoning and comprehensive environmental provisions, Tallahassee makes clear that tree canopy and its incidental benefits are priorities for the city.

G. Parking and Pavement: Paterson, NJ – Zoning Use and Dimensional Requirements

About 90% of parking lots are paved with asphalt due to its cost-effectiveness and durability; however, such dark colored materials absorb heat, thus exacerbating what is known as the urban heat island (UHI) effect.⁸⁷ UHIs occur when natural surfaces are replaced with manmade infrastructure, such as parking lots, in a concentrated area. An abundance of surfaces that retain heat leads to hotter temperatures in urban neighborhoods.⁸⁸ People living in lightly vegetated urban spaces are far more likely to experience heat-related deaths than people in shadier areas.⁸⁹ Studies have revealed this risk can be as high as thirty percent more likely in

⁸⁵ See *id.*

⁸⁶ See *id.* Section (j) requires compensation for removal of protection trees, determined using tree debits and tree credits. Tree debits and tree credits are terms used to represent the taking or the preservation of a two-inch diameter at breast height tree or larger.

⁸⁷ Hannah Dauray, *Climate Resiliency & Parking Structures*, PACE ENV'T L. REV. BLOG (Oct. 18, 2023), <https://pelr.blogs.pace.edu/2023/10/18/climate-resiliency-parking-structures/> [<https://perma.cc/8G7A-GLZX>]; Bill Palmer, *Concrete Parking Lots*, CONCRETENETWORK.COM <https://www.concretenetwork.com/concrete-parking-lots/#:~:text=Today%2C%20about%2090%25%20of%20parking,says%2C%20a%20no%20brainer> [<https://perma.cc/JP8D-HLCR>].

⁸⁸ To demonstrate just how drastic this effect can be, a group of researchers reported in *Urban Forestry and Urban Greening* that the temperature of the surface of one parking lot at noon on a summer day was fifty-nine degrees Fahrenheit hotter than that of a nearby grassy field. The same researchers also found the air temperature immediately above the lot was thirty-five degrees Fahrenheit higher than the field. These “islands” of heat lead to greater energy use for things like air conditioning and increased risk of heat related illnesses. See *id.*; see also Akio Onishi, Xin Cao, Takanori Ito, Feng Shi, Hideo Imura, *Evaluating the Potential for Urban Heat-Island Mitigation by Greening Parking Lots*, 9 URBAN FORESTRY & URBAN GREENING 4 (2010).

⁸⁹ See Jude Coleman, *Heat waves cause more illness and death in U.S. cities with fewer trees*, SCIENCE NEWS (Apr. 8, 2024, 5:00 AM), <https://www.sciencenews.org/article/heat-waves-illness-death-cities-fewer-trees> [<https://perma.cc/KN3E-BUNT>].

some urban environments.⁹⁰ That figure results in around 1,500 deaths per year, surpassing the number of fatalities resulting from any other severe weather events.⁹¹ Mortality is the most tragic effect of UHI, but there are other negative health effects, too, including “heat strokes, dehydration, loss of labor productivity, and decreased learning.”⁹²

The city of Paterson, New Jersey, has adopted a zoning ordinance as part of its Zoning Code for off-street parking that provides opportunities to reduce the amount of required parking through shared parking and land-banking for future parking.⁹³ This flexibility is consistent with Paterson’s 2014 Master Plan land use goal of “address[ing] excessive parking standards.”⁹⁴ Paterson’s 2017 Center City Expansion Redevelopment Plan integrated aspects of the ordinance, including the goal of encouraging shared parking.⁹⁵ Paterson also eliminated minimum parking requirements in its Center City Mall-Entertainment and Mixed-Use Downtown districts.⁹⁶

The Zoning Code’s Shared Parking provision designates allowable reduction percentages for the following seven specific uses: retail sales, offices, service establishments, restaurants, ballrooms, banquet halls, and meeting rooms.⁹⁷ This could potentially fast-track Planning Board approvals for parking shared by those listed uses.⁹⁸ Developers may satisfy the parking requirements in a joint parking program, provided that (1) the Planning Board approves the joint program; (2) the area for the parking facilities shall be adequate to provide the sum total of

⁹⁰ See Mat Santamouris, *Recent Progress on Urban Overheating and Heat Island Research. Integrated Assessment of the Energy, Environmental, Vulnerability and Health Impact. Synergies with the Global Climate Change*, 207 ENERGY & BUILDINGS (2020).

⁹¹ Katie Good, *The Disproportionate Impact of Climate Change on People Experiencing Homelessness*, TEXAS HOMELESS NETWORK, <https://www.thn.org/2024/04/03/the-disproportionate-impact-of-climate-change-on-people-experiencing-homelessness/#:~:text=Around%20the%20country%2C%20heat%20contributes,related%20causes%20than%20sheltered%20individuals> [https://perma.cc/A5TK-PUCX].

⁹² See Angel Hsu, Glenn Sheriff, Tirthankar Chakaborty, & Diego Manya, *Disproportionate Exposure to Urban Heat Island Intensity Across Major U.S. Cities*, 12 NATURE COMM’CS (2021).

⁹³ CITY OF PATERSON, ZONING AND LAND DEV. CH. 483, §500-7 (2016), https://www.patersonnj.gov/egov/documents/1463422578_02635.pdf [hereinafter PATERSON ZONING AND LAND DEV.].

⁹⁴ City of Paterson, *Master Plan* (Mar. 2014), https://www.patersonnj.gov/egov/documents/1395155623_756225.pdf [https://perma.cc/V898-G2D4].

⁹⁵ City of Paterson, *Center City Expansion Redevelopment Plan* 17 (Feb. 2017), https://www.patersonnj.gov/egov/documents/1525282984_07106.pdf [https://perma.cc/P6JK-6ZCL].

⁹⁶ *Id.* at 22.

⁹⁷ PATERSON ZONING AND LAND DEV., *supra* note 92.

⁹⁸ A planning board is the government entity responsible for reviewing and approving or denying development proposals. In many cities, the planning board is comprised of volunteers.

off-street parking space requirements; and (3) parking requirements for a use in a non-residential district shall not be satisfied within a residential district⁹⁹

The ordinance also creates a “land-banking” program whereby the Board may determine that fewer than the required number of parking spaces is sufficient, the Board may “waive” or “landbank” the improvement of up to 1/3 of the total number of spaces. This flexibility demonstrates that Paterson and other municipalities like it are moving away from arbitrary parking standards and, instead, turning toward tailored solutions.

H. Floodplain Management: Jacksonville, Florida – *Environmental Chapter*

Floodplains play an essential role in the exchange of water masses and matter between river and terrestrial ecosystems, thus influencing water quality.¹⁰⁰ Scholars have observed that “[c]limate change and the increasing frequency and intensity of extreme weather events, such as floods, tornadoes, droughts and the drying of streams and rivers as well as the major environmental degradation observed in many catchments and floodplains, have led to a reduction in the carrying capacity of the global system.”¹⁰¹

The Jacksonville Code of Ordinances includes a chapter containing floodplain management regulations. Chapter 652 of the Code of Ordinances, *Floodplain Management Ordinance*, implements numerous land use strategies aimed at mitigating the effects of flooding.¹⁰² In coordination with the Florida Building Code, the City of Jacksonville utilizes its land use authority to protect lives and property from floodwaters.¹⁰³ For example, the ordinance includes a ban on variances that will increase base flood elevation in specific areas.¹⁰⁴ It reads:

“[a] variance shall not be issued for any proposed development in a floodway if any increase in base flood elevations would result, as evidenced by the applicable analyses and certifications.”

⁹⁹ City, *supra* note 96, §500-7.1 (“General Provisions for Off-Street Parking: C. Joint Parking Facilities. Required parking may be satisfied through participation in a joint parking program involving 2 or more uses; provided that”).

¹⁰⁰ See Wolfgang J. Junk, Philip B. Bayley & Richard E. Sparks, *The Flood Pulse Concept in River-Floodplain Systems*, 106 CAN. SPEC. PUBL’N FISHERIES & AQUATIC SCIS. 110, 110–127 (1989); Klement Tockner, François Malard & J.V. Ward, *An Extension of the Flood Pulse Concept*, 14 HYDROLOGICAL PROCESSES 2861, 2861–2883 (1999); Elżbieta Kiedrzyńska, Mariusz Kiedrzyński & Marek Urbaniak, *Point Sources of Nutrient Pollution in the Lowland River Catchment in the Context of the Baltic Sea Eutrophication*, 70 ECOLOGICAL ENG’G 337, 337–348 (2014); William J. Mitsch, Blanca Bernal & María E. Hernandez, *Ecosystem Services of Wetlands*, 4 INT’L J. BIODIVERSITY SCI. & MGMT. 1, 1–5 (2015).

¹⁰¹ Edyta Kiedrzyńska, Marcin Kiedrzyński, Maciej Calewski, *Sustainable Floodplain management for flood prevention and water quality improvement*, 75 NAT. HAZARDS 955, 956 (2015).

¹⁰² See JACKSONVILLE, FLA., CODE OF ORDINANCES § 652.102 (2024), available at https://library.municode.com/fl/jacksonville/codes/code_of_ordinances?nodeId=TITXVIII_AUS_CH652FLMA_PTIGE_S652.102SC [<https://perma.cc/QBQ3-4HBX>].

¹⁰³ See *id.* § 652.103.

¹⁰⁴ See *id.* § 652.704.

The code features various types of ordinances that consider resiliency to flooding, such as regulations for decks and patios, and requirements for concrete slabs used for parking pads, among other things, in certain areas.¹⁰⁵ Section 652.1605 reads:

“In coastal high hazard areas and Adjusted SFHAs [Special Flood Hazard Areas], concrete slabs used as parking pads, enclosure floors, landings, decks, walkways, patios and similar nonstructural uses are permitted beneath or adjacent to buildings and structures provided the concrete slabs are designed and constructed to be:

- (a) Structurally independent of the foundation system of the building or structure;
- (b) Frangible and not reinforced, so as to minimize debris during flooding that is capable of causing significant damage to any structure; and
- (c) Have a maximum slab thickness of not more than four inches.”¹⁰⁶

Beyond the ordinance, both Chapter 754, the Stormwater Utility Code, and Chapter 654, the Code of Subdivision Regulations, contain regulations that promote floodplain management.¹⁰⁷ Namely, the Stormwater Utility Code encourages the retention and detention of stormwater runoff to reduce the need for storm sewers and the Code of Subdivision Regulations requires builders to secure permits from the Building Inspection Division before undertaking development in special floodplain hazard areas.¹⁰⁸ Overall, Jacksonville comprehensively protects existing structures from floods and promotes conscientious development with flood risks in mind.

I. Distributed Energy: San Francisco Case Study – *Environmental Chapter*

Distributed generation refers to “a variety of technologies that generate electricity at or near where it will be used, such as solar panels and combined heat and power.”¹⁰⁹ Distributed generation may serve a single structure, such as a home or business, or it may be part of a microgrid (a smaller grid that is also tied into a larger electricity delivery system), such as at a major industrial facility, a military

¹⁰⁵ See *id.* § 652.1605-6.

¹⁰⁶ *Id.* § 652.1605.

¹⁰⁷ JACKSONVILLE, FLA., CODE OF ORDINANCES, *Ch. 754*, available at <https://www.jacksonville.gov/departments/public-works/about-stormwater/chapter-754-stormwater-management-utility-code>.

¹⁰⁸ See *id.*

¹⁰⁹ *Distributed Generation of Electricity and Its Environmental Impacts*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/energy/distributed-generation-electricity-and-its-environmental-impacts> [<https://perma.cc/ZLS5-RS6K>].

base, or a large college campus.¹¹⁰ When connected to the electric utility's lower voltage distribution lines, distributed generation can help "support delivery of clean, reliable power to additional customers and reduce electricity losses along transmission and distribution lines."¹¹¹

San Francisco's goal is to achieve zero GHG emissions from large buildings by 2035.¹¹² Nine percent of commercial buildings in San Francisco are larger than 50,000 square feet, and they account for seventy-three percent of commercial building electricity use.¹¹³ To meet this goal, San Francisco has adopted the 100% Renewable Electricity for Commercial Buildings Ordinance so that certain nonresidential buildings must use on-site energy systems or pay for one hundred percent renewable energy.¹¹⁴ San Francisco provides commercial and residential property owners a range of financing options and incentives for energy efficiency projects through the Energy Watch and BayREN programs.¹¹⁵

Under Chapter 30 of the San Francisco Environment Code, Renewable Energy for Commercial Buildings, each nonresidential building shall "ensure that all on-site electricity demands are met through any combination of: on-site generation from 100% [GHG]-free or renewable energy resources, and/or purchase from 100% [GHG]-free or renewable energy resources."¹¹⁶ In providing a menu of options, San Francisco makes the clean energy transition more feasible for developers.

J. Disaster and Hazard Management: Long Beach, California – Other Municipal Code Chapters Regulating Land Use

The combination of sea level rise and more intense storm events can lead to a host of problems, including reduced freshwater supplies and severe damage to infrastructure of all types, such as energy generation plants, and coastal and flood plain ecosystems.¹¹⁷ The threat of extreme precipitation is of particular concern in

¹¹⁰ *See id.*

¹¹¹ *See id.* (In the residential sector, common distributed generation systems include solar photovoltaic panels, small wind turbines, natural-gas-fired fuel cells, and emergency backup generators, usually fueled by gasoline or diesel fuel. In the commercial and industrial sectors, distributed generation can include resources such as: combined heat and power systems, solar photovoltaic panels, wind, hydropower, biomass combustion or cofiring, municipal solid waste incineration, fuel cells fired by natural gas or biomass, and reciprocating combustion engines, including backup generators.).

¹¹² *Energy Efficiency in Existing Commercial Buildings*, S.F. ENV'T DEP'T, <https://www.sfenvironment.org/energy-efficiency-existing-commercial-buildings> [<https://perma.cc/JBL9-E6JK>].

¹¹³ *See 100% Renewable Electricity Commercial Buildings Ordinance*, S.F. ENV'T DEP'T, <https://www.sfenvironment.org/100-renewable-electricity-commercial-buildings-ordinance> [<https://perma.cc/9HEJ-FY5G>].

¹¹⁴ *See id.*

¹¹⁵ *See Bay Area Regional Energy Network (BayREN)*, BAYREN, <https://www.bayren.org> [<https://perma.cc/X7US-EC64>].

¹¹⁶ S.F., CAL., ENV'T CODE § 3003(b) (2019), available at https://codelibrary.amlegal.com/codes/san_francisco/latest/sf_environment/0-0-0-48595.

¹¹⁷ *See Climate Change Impacts on Freshwater Resources*, EPA, <https://www.epa.gov/climateimpacts/climate-change-impacts-freshwater-resources> [<https://perma.cc/PQT2-V3D5>]; *see also Climate Impacts on Water Utilities*, EPA, <https://www.epa.gov/arc-x/climate-impacts-water-utilities> [<https://perma.cc/P4N9-KEZ9>].

the Northeast and Midwest regions where the intensity and number of extreme rainfall events have increased substantially over the past thirty years, with flooding drastically affecting communities in the Northeast.¹¹⁸ Climate change brings with it warmer air which contains more water vapor and affects weather patterns, particularly in storm fronts in mid-latitude regions.¹¹⁹ Both rising sea levels and more frequent storms can yield more earthquakes because these events increase hydrostatic pressure underground.¹²⁰ Our next case study explores how an earthquake-prone region deals with these new challenges.

Long Beach is susceptible to earthquakes due to the city's proximity to several faults, which are zones of weakness in the earth's crust.¹²¹ Long Beach adopted "Earthquake Hazard Regulations," a systematic procedure for identifying and assessing earthquake generated hazards associated with certain existing structures within the city and to develop a flexible, yet uniform and practical procedure for correcting or reducing those hazards to tolerable hazard levels.¹²² Under Chapter 18.68 of the Long Beach municipal code, all buildings must have a seismic resisting system conforming with the UBC Section 2303(b).¹²³ Section C of the Earthquake Hazard Regulations requires that the following construction information be included in the seismic resisting systems:¹²⁴

- "1. Dimensioned floor and roof plans showing existing walls and the size and spacing of floor and roof framing members and sheathing materials.
2. Dimensioned wall elevations showing openings, piers, wall classes, thicknesses, heights, wall shear test locations, and cracks or damaged portions requiring repairs."¹²⁵

¹¹⁸ See *id.*

¹¹⁹ See *id.*

¹²⁰ See *Mehr Erdbeben durch menschengemachten Klimawandel [More Earthquakes Due to Global Warming]*, HELMHOLTZ CENTRE POTSDAM - GFZ GERMAN RESEARCH CENTRE FOR GEOSCIENCES (May 29, 2024), <https://www.gfz.de/en/press/news/details/mehr-erdbeben-durch-menschengemachten-klimawandel> [<https://perma.cc/456Q-6MCY>].

¹²¹ See generally Robert Clayton, Yan Yang, Eric Campbell & Dan Hollis, *Long Beach and Seal Beach Seismic Hazard*, CALTECH (Dec. 9, 2020) <https://web.gps.caltech.edu/~clay/SealBeachHazard/SealBeachHazard.html> [<https://perma.cc/AYJ4-5VRD>].

¹²² See LONG BEACH, CAL., CH. 18.68.010 (2025) available at https://library.municode.com/ca/long_beach/codes/municipal_code?nodeId=TIT18LOBEBUSTC_O_CH18.68EAHARE.

¹²³ See *id.* CH. 18.68.023. UBC is the 1988 Edition of the Uniform Building Code as published by the International Conference of Building Officials. See generally UNIFORM BUILDING CODE, INT'L CONF. OF BLDG. OFFS., (1988).

¹²⁴ See LONG BEACH, CAL., *supra* note 121. The plans shall indicate all existing and new crosswalls and their materials of construction. The location of the crosswalls and their openings shall be fully dimensioned or drawn to scale on the plans.

¹²⁵ See *id.* The general condition of the mortar joints shall be noted and if and where the joints require pointing. Where the exterior face is veneer, the type of veneer, its thickness and its bonding and/or ties to the structural wall masonry shall also be reported.

3. The type of interior wall and ceiling surfaces.
4. The extent and type of existing wall anchorage to floors and roof when utilized in the design.
5. The extent and type of parapet corrections which were previously performed, if any.
6. Repair details, if any, of cracked or damaged unreinforced masonry walls required to resist forces specified in this chapter.
7. All other plans, sections, and details necessary to delineate required retrofit construction including those items in Section 18.68.028.”¹²⁶

By requiring the construction information, Long Beach can hold its developers accountable to create earthquake resilient buildings.

K. Public Health: Newark, New Jersey – *Principal Land Use Boards*

Climate change threatens to undermine the last half-century of gains in development and global health.¹²⁷ Climate scientists have indicated that the direct effects of climate change include “increased heat stress, floods, drought, and increased frequency of intense storms, with the indirect threatening population health through adverse changes in air pollution, the spread of disease vectors, food insecurity and undernutrition, displacement and mental illness.”¹²⁸ In response to—and in anticipation of—these increased threats to public health, municipalities like Newark, New Jersey have pursued regulations that protect the public throughout the development process.

Newark has included in its Zoning Regulations an Environmental Review Checklist to assess the impact of development projects on the health of the people and environment in the surrounding community.¹²⁹ Newark has created two Environmental Justice and Cumulative Impact Checklists for development, depending on its intended use: one for Commercial or Light Manufacturing Use, and the other for Industrial Use.¹³⁰ Developers must submit their completed checklist for “site plan approval from the Newark Central Planning Board or approval of a

¹²⁶ See *id.*

¹²⁷ See Nick Watts, W. Neil Adger, Paolo Agnolucci, Jason Blackstock, Peter Byass, Wenjia Cai, Sarah Chaytor, Tim Colbourn, Mat Collins, Adam Cooper, Peter M Cox, Joanna Depledge, Paul Drummond, Paul Ekins, Victor Galaz, Delia Grace, Hilary Graham, Michael Grubb, Andy Haines, Ian Hamilton, Alasdair Hunter, Xujia Jiang, Moxuan Li, Melissa Lott, Robert Lowe, Yong Luo, Georgina Mace, Mark Maslin, Maria Nilsson, Tadj Oreszczyn, Steve Pye, Tara Quinn, My Svensdotter, Sergey Venevsky, Koko Warner, Bing Xu, Jun Yang, Yongyuan Yin, Chaoqing Yu, Qiang Zhang, Peng Gong, Hugh Montgomery & Anthony Costello, *Health and Climate Change: Policy Responses to Protect Public Health*, 386 LANCET 1861, 1861 (2015).

¹²⁸ See *id.*

¹²⁹ *Newark EJ Ordinance: Environmental Review Checklist*, N.J. ENV'T JUST. ALL. (Aug. 2, 2021), <https://njeja.org/newark-ej-ordinance-environmental-review-checklist> [https://perma.cc/9SDA-WQL2].

¹³⁰ See *id.*; see also NEWARK, N.J., NEWARK CODE ENV'T REV. CHECKLIST CH. 41:20A, available at <https://njeja.org/wp-content/uploads/2021/08/NewarkEnvironmentalJusticeOrdinance.pdf>.

variance from the Zoning Board of Adjustment” before proceeding with development.”¹³¹

The Newark Environmental Commission, in consultation with City of Newark departmental staff, is directed to research, draft, and present to the Central Planning Board and Zoning Board of Adjustment a Natural Resources Index (NRI).¹³² The NRI will include data on “built, natural, environmental, health and demographic features that occur within Newark’s boundaries.”¹³³ The NRI will also seek to make visible to the public geospatial information about environmental features, both positive and negative, as juxtaposed to demographic and health data, to develop a better understanding of the relationships among environment, land use, public health, and neighborhood quality of life.¹³⁴

The code also requires applicants to prepare and submit an Environmental Review Checklist to the Central Planning Board or Zoning Board, as appropriate, as a required component of any application for major site plan approval or for a variance.¹³⁵ By baking these environmental justice considerations into the approval process, Newark provides greater protection for its vulnerable populations.

L. Water Conservation: Woodbury, Minnesota – Special Topic Plan

With the growing threat of water scarcity materializing in droughts on both coasts and the decision in *Sackett v. Environmental Protection Agency*, it is more important than ever that land use planners account for water-protective measures when implementing policies.¹³⁶ Across the country, localities have adopted numerous strategies to protect their natural resources such as open space protection, erosion and sedimentation control, grading, filling and excavations, ground water and aquifer resource protection, and stormwater management, among others. Interestingly, many of these ordinances deal with the prevention of nonpoint source

¹³¹ NEWARK, N.J., ZONING AND LAND USE REGUL. §§ 41:20–3 (2023), available at <https://ecode360.com/36713865#36713899>.

¹³² See *id.* §§ 41:20–4.

¹³³ *City of Newark Environmental Resource Inventory*, CITY OF NEWARK 176 (2021), www.arcgis.com/home/item.html?id=b8d1365a87384131affeca57c8251ee9 [<https://perma.cc/AML3-6BUD>].

¹³⁴ See *id.*

¹³⁵ See *id.* at 207 (“Covered applicants shall prepare and submit an Environmental Review Checklist to the Central Planning Board or Zoning Board, as appropriate, as a required component of any application for major site plan approval or for a variance in the form attached to this Chapter 41:20 as Exhibit A. The checklist for projects which meet the criteria of Section 41:20-3, Covered Applicant, hereof shall be amended to include said Environmental Review Checklist and shall be provided to all covered applicants.”).

¹³⁶ *Sackett v. EPA*, 598 U.S. 651, 684 (2023) (narrowing the scope of federal regulatory authority under the Clean Water Act by redefining what constitutes “waters of the United States.”).

pollution, which is a critical environmental problem that is generally conceded to be beyond the effective reach of federal environmental law.¹³⁷

Woodbury's surface water management plan (SWMP) describes the physical and regulatory setting, gives an assessment of existing and potential problems, and then offers implementation goals, policies, and priorities focused around four topics: resilience, quantity, quality, and planning.¹³⁸ Woodbury is home to three watersheds; therefore, the SWMP takes special care to address the unique features of each, working in conjunction with the three Watershed District Organizations.¹³⁹

Under the principle of "one water vision," the city recognizes connection among surface water, groundwater, and drinking water and the importance of considering impacts to all water resources when making decisions. In chapter six, the impaired waters table identifies impaired waters within the city and those to which the city discharges as part of its watershed restoration and protection study (WRAPS) and identifies the total maximum daily load (TMDL).¹⁴⁰ Unlike a traditional TMDL study, though, the WRAPS expands its protections to areas not yet impaired but at risk, so it is forward-looking.¹⁴¹ Additionally, chapter seven identifies resilience goals like "design surface water system to mimic natural hydrology and provide flood protection" and "reduce or maintain existing flows to lakes, wetlands, and streams through a rate control policy to control flooding and maintain natural communities of those surface waters."¹⁴² This reflects the SWMP's broader mission to work with nature, rather than against it.

Finally, the SWMP designs the system to improve quality and quantity, and uses stormwater as an amenity; manages stormwater so it promotes groundwater recharge and protects drinking water and wells; and educates the public on surface water protection and impacts of urban stormwater on water resources.¹⁴³ All told, the plan and accompanying portions of code demonstrate that Woodbury is taking stock of its water resources and seeking to protect them holistically.

The dominant methods of enacting CRD are environmental chapters, zoning and dimensional requirements, supplemental substantive zoning provisions, and special topic and area plans. Though the research to date has yielded instances of CRD materializing in comprehensive plans, public health chapters, and the powers and duties of special interest land use boards, these instances are less

¹³⁷ Nonpoint source pollution is pollution that does not originate from a single identifiable source. *Basic Information About Nonpoint Source Pollution*, EPA (Nov. 22, 2024), <https://www.epa.gov/nps/basic-information-about-nonpoint-source-nps-pollution> [<https://perma.cc/JC2A-44WL>].

¹³⁸ CITY OF WOODBURY, 2040 LOCAL SURFACE WATER MANAGEMENT PLAN 1 (2019).

¹³⁹ A watershed is an area of land where water, like rain and snowmelt, flow into a common body of water.

¹⁴⁰ *See id.* at 58.

¹⁴¹ *See id.* at 58.

¹⁴² *Id.* at 65.

¹⁴³ Though the SWMP is not codified, there are several portions of the Woodbury code that facilitate it. For example, the Woodbury code of ordinances references the stormwater management standards and design criteria. Additionally, the Metropolitan Surface Water Management Act passed in 1982 created Minnesota statute 103B, which requires all local governments to address surface water management via participation in a watershed management organization. Section 235 dictates that after required watershed management plan approved, the local government must create local water management plans.

frequent. The project is ongoing; therefore, the recurrence of these framework elements may increase as the research progresses.

VI. CONCLUSION - FEASIBILITY OF THE FRAMEWORK LAW

IPCC defines ‘feasibility’ as “the potential for a mitigation or adaptation option to be implemented.”¹⁴⁴ IPCC integrates the term ‘enabling conditions’ throughout its latest report, a term to describe “conditions that enhance the feasibility of adaptation and mitigation options.” Enabling conditions include “political commitment and follow-through, institutional frameworks, policies and instruments with clear goals and priorities, enhanced knowledge on impacts and solutions...and inclusive governance processes.”¹⁴⁵

This Article describes a framework of strategies that is built on the existing structure of land use laws found in most municipalities nationally. It is familiar. The strategies are to be adopted voluntarily in response to local climate change impacts. It is responsive rather than prescriptive. It comprises actual laws that have been adopted by peer cities and towns; its strategies are credible to local stakeholders in similar circumstances. Those actors manage the legal system that determines patterns of development and conservation and the shape of human settlements. These patterns and settlements are the focus of Climate Resilient Development, which the IPCC states “integrates adaptation measures and their enabling conditions with mitigation to advance sustainable development for all.”¹⁴⁶

Enabling conditions abound in the operation of local land use decision-making. Most of the framework’s strategies are local laws, which are adopted after public notice and public hearings. Comprehensive plans and special plans are often preceded by intensive participation of engaged stakeholders from the civic and private sectors as well as government officials, elected and appointed. Administrative boards hear proposals for development projects. These processes impart data and other information to local stakeholders.

The stakeholders who are interested in mitigating and adapting to climate change can be enablers if they engage in land use law reform at the local level. They can appear before local legislative bodies and propose the adoption of climate action components of comprehensive plans or the adoption of one or more of the legal

¹⁴⁴ IPCC AR6 Working Group III Summary for Policymakers: *Headline Statements*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, <https://www.ipcc.ch/report/ar6/wg3/resources/spm-headline-statements/> [<https://perma.cc/3AFR-SU3U>].

¹⁴⁵ WG II AR6, *supra* note 3, at 27 & 163.

¹⁴⁶ *Id.* This emphasis on implementation is new in the content and emphasis of Working Group reports. Academics have relied on the concept of enabling conditions since as early as 1960. See Heidi R. Huber-Stearns, Drew E. Bennett, Stephen Posner, Ryan C. Richards, Jenn Hoyle Fair, Stella J. M. Cousins & Chelsi L. Romulo, *Social-Ecological Enabling Conditions for Payments for Ecosystem Services*, 22 *ECOLOGY & SOC’Y* 1 (2017) (noting that multiple fields have addressed the concept of enabling conditions including economics, political science, and ecology). However, the IPCC first brought the term into its vocabulary in the 2022 IPCC Sixth Assessment Report (SAR). The term does not appear in the 2014 Fifth Assessment Report or the prior four reports.

strategies contained in the framework law. They can appear before local land use review boards and advocate for decisions congruent with those strategies. They can design robust citizen engagement processes as the framework is constructed locally. The IPCC, in calling for Climate Resistant Development, has captured the mysterious power of the land use authority delegated to most of the nation's municipal governments. In doing so, it has designed a local solution to the global problem of climate change, insufficient perhaps but with too much potential to be ignored.

FROM ‘UNDER SIEGE’ TO ‘UNDER CONSTRUCTION’: HOW CITIES THRIVE IN HOSTILE TIMES

*By: Mayor Quinton Lucas**

I. OPENING REMARKS

Thank you to the Kansas Journal of Law and Public Policy for inviting me to deliver this year’s symposium keynote address. It’s particularly meaningful to be here as part of the “Cities of Tomorrow: Legal Approaches to Urban Health and Sustainability” symposium. And it’s always special to be back at KU Law, where I continue to serve as a faculty member when I’m not occupied with the slight distraction of running Missouri’s largest city.

Today, I want to share some insights that bridge academic analysis and practical experience. I’ll begin by examining the increasingly hostile legal landscape cities face, building on my recent scholarship about new forms of state preemption. Drawing from my experience as mayor, I’ll then propose a framework for how cities can thrive even in challenging political environments, and I’ll share specific examples of how we’ve put these principles into practice in Kansas City.

II. HISTORICAL CONTEXT

I want to begin with the most basic legal conception of a city, something called “Dillon’s Rule.” Now, I know what some of you are thinking—“great, the mayor is going to give us a history lesson.” But bear with me, because understanding where we started helps explain both the challenges cities face today and, more importantly, how we might overcome them.

* This article presents a lightly edited transcript of the keynote address from the symposium: “Cities of Tomorrow: Legal Approaches to Urban Health and Sustainability.” This symposium was held on February 28, 2025, at the University of Kansas and sponsored by the *Kansas Journal of Law & Public Policy*. Mayor Quinton Lucas is the Mayor of Kansas City, Missouri. Mayor Lucas is a graduate of Washington University in St. Louis and obtained a law degree from Cornell University. He clerked on the United States Court of Appeals for the Eighth Circuit, practiced law, and represented the City’s Third District At-Large on the City Council. He became a professor at the University of Kansas School of Law in 2012. He remains a member of the law faculty, where he teaches and publishes on Local Government Law. Mayor Lucas uses his legal academic background to bridge the gap between scholars and practitioners by engaging with a wide range of legal actors including public interest organizations, law schools, and other thought leaders and strategic actors.

In 1872, Iowa Supreme Court Chief Justice John Dillon wrote what became the foundational text of American municipal law.¹ His core principle was simple: cities are completely subordinate to their states.² They have only those powers explicitly granted by state law, and nothing more.³ If there's any doubt about a city's authority, Dillon said, assume the city doesn't have it.⁴

III. THE EVOLUTION OF CITY-STATE RELATIONS

Dillon's Rule proved immediately problematic for growing American cities. As urbanization accelerated in the late nineteenth century, cities faced challenges requiring quick, local responses—public health crises, infrastructure needs, economic development opportunities. But every time they tried to act, they had to first prove they had explicit permission from their state legislature.

The home rule movement emerged from this frustration.⁵ Progressive Era reformers argued that cities needed genuine autonomy to govern effectively.⁶ Their efforts led to constitutional amendments and state laws granting cities more authority over local affairs. Kansas City became a home rule charter city, theoretically giving us significant local authority, but only in specifically delineated arenas.⁷

But even today, with home rule provisions in place across the country, cities remain fundamentally creatures of state law. The baseline assumption—that cities have only those powers explicitly granted by states—still shapes how courts view city authority. And in recent years, states have begun wielding this authority in increasingly aggressive ways.

IV. THE NEW FACE OF PREEMPTION

We're seeing what scholars call “new preemption” or “hyper preemption”—aggressive state actions designed not just to override city policies but to actively harm cities that dare to disagree with their states.⁸ The 2016 North Carolina “bathroom bill”⁹ marked a turning point. When Charlotte passed protections for transgender residents, the state didn't just override the ordinance, it

¹ John F. Dillon, *Treatise on the Law of Municipal Corporations* 102 (Chicago, James & Cockcroft & Co. 1872).

² *Id.* at 478.

³ *Id.* at 480.

⁴ *Id.*

⁵ Dwight Merriam, *Affordable Housing: Three Roadblocks to Regulatory Reform*, 51 Urb. Law. 343 (2022).

⁶ See Daniel S. Cohen, *A Gun to Whose Head? Federalism, Localism, and the Spending Clause*, 123 Dick. L. Rev. 421, 453 (2019).

⁷ KANSAS CITY, MO., CHARTER OF THE CITY OF KANSAS CITY, MO. art. I, § 102 (2025).

⁸ E.g., Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995 (2018); Erin Adele Scharff, *Hyper Preemption: A Reordering of the State-Local Relationship?*, 106 GEO. L.J. 1469 (2018).

⁹ Public Facilities Privacy & Security Act, N.C. Gen. Stat. Ann. § 115C-521.2 (2016).

prohibited any such protections statewide.¹⁰ More troublingly, it sparked copycat legislation in states whose cities hadn't even considered such protections.¹¹

Here in Missouri, we've seen aggressive state preemption with firearms regulation. Let me read you the actual statute: "No county, city, town, village, municipality, or other political subdivision of this state shall adopt any order, ordinance or regulation concerning in any way the sale, purchase, purchase delay, transfer, ownership, use, keeping, possession, bearing, transportation, licensing, permit, registration, taxation... or other controls on firearms."¹² The sweep of this preemption is breathtaking—it doesn't just limit city authority; it eliminates it entirely. Preemption is typically about avoiding conflict between city and state laws, but Missouri's firearm preemption law is about disempowering a city in an entire field of regulation.

States aren't stopping there. Some have passed laws imposing personal liability on city officials who dare to challenge state authority.¹³ Others have threatened to withhold state funding from cities that step out of line.¹⁴ We're seeing what scholars call "deregulatory preemption"—where states claim entire areas of policy as exclusively their domain not for the purpose of productivity or efficiency or even good governance, but for the sole purpose of stifling local innovation or adaptation.

V. POST-EMPTION: A NEW THREAT

In my recent scholarship, I identified an even more targeted form of state control that I've termed "post-emption."¹⁵ Unlike traditional preemption, which sets rules for the future, post-emption responds directly to specific city actions.¹⁶ Think of it as a line-item veto of city policy.

Take what almost happened recently in Kansas: when Lawrence banned single-use plastic bags,¹⁷ the state legislature immediately introduced legislation to stop, as they put it, all Kansas cities from banning single use bags.¹⁸ This wasn't about establishing uniform environmental standards—it was pure retaliation against

¹⁰ *Id.*

¹¹ Matt Laviertes, *Transgender Bathroom Bills are Back. Does the Nation Care?*, NBC NEWS (Feb. 3, 2024, 6:00 A.M.), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/transgender-bathroom-bills-are-back-nation-care-rcna137014> [<https://perma.cc/N75G-X6UU>].

¹² Mo. Rev. Stat. § 21.750.2.

¹³ *E.g.*, *How Florida is Pushing Abusive Preemption in the 2024 Legis. Session*, LOC. SOLS. SUPPORT CTR. (Mar. 1, 2024), <https://www.supportdemocracy.org/the-latest/weeks-into-2024-legislative-session-abusive-preemption-again-emerges-as-threat-to-democracy-xwdf> [<https://perma.cc/ZU9E-24F2>].

¹⁴ *See, e.g.*, Arizona Act of Mar. 17, 2016, ch. 35, 2016 Ariz. Sess. Laws 161 (codified as amended in scattered sections of 41, 42, and 43 ARIZ. REV. STAT.).

¹⁵ Quinton D. Lucas & Gavriel Schreiber, *Post-Emption and the Mayoral Toolbox: Levers and Limits of City Resistance to State Preemption*, 91 U. CHI. L. REV., 2229, 2233 (2024).

¹⁶ *Id.*

¹⁷ LAWRENCE, KAN., ORDINANCE NO. 9996 (2023).

¹⁸ H.R. 2446, 2023 Leg. Sess. (Kan. 2023).

a specific local initiative. There had been no momentum in Topeka for a law of this kind until Lawrence exerted its own sovereign prerogative, at which point the legislature stepped in to shoot down the local law. While Governor Kelly ultimately vetoed the bill, it exemplifies how states are increasingly using their authority not to govern, but to disempower and punish.

We're experiencing this firsthand in Kansas City with our source-of-income discrimination ban. Our ordinance aims to prevent landlords from automatically rejecting tenants with housing vouchers or other forms of legal income.¹⁹ The state legislature responded with targeted legislation to void our ordinance.²⁰ When it failed in the Senate last year, they simply reintroduced it this session. This isn't theoretical for us—it's an ongoing battle that affects real people's ability to find housing.

VI. THE LIMITED LEGAL RECOURSE

You might wonder why cities don't just fight back in court. The answer lies in that fundamental legal status we discussed earlier. Remember Dillon's Rule: cities are creatures of state law. This isn't just historical trivia; it's the baseline assumption that shapes how courts view city authority even today.

Even in home rule cities like Kansas City, our authority extends only as far as the state allows. We can't sue our state for violating our rights because, legally speaking, we don't have rights independent of the state and those specifically enumerated in our home rule charter. We can't claim state laws exceed constitutional bounds because, from a constitutional perspective, we're basically just administrative subdivisions of the state.

This vulnerability is particularly acute in the current political climate. When states target cities with punitive preemption or post-emption, our legal options are severely limited. Courts generally defer to state authority, and state legislatures can simply change the law to close any loopholes cities might find.

VII. FINDING A PATH FORWARD

Now, this might all sound rather grim. But this is where my perspective as a mayor rather than just a legal scholar becomes relevant. Because while the legal landscape is challenging, experience has taught me that cities can still thrive—if we're willing to think differently about how we engage with our states.

Let me tell you a story that changed my perspective. In 2022, during one of the most contentious periods between Kansas City and our police department—after the first conviction of an officer in Jackson County history for killing an unarmed Black person, and while I was personally involved in three separate lawsuits over police funding—I found myself sitting shoulder-to-shoulder in Jefferson City with the president of the Fraternal Order of Police.

Kansas City's previous attempts at public safety advocacy before the state legislature had been unsuccessful at best, actively counterproductive at worst. Each appearance seemed to deepen divisions rather than bridge them. And yet there we

¹⁹ KANSAS CITY, MO., ORDINANCE NO. 231019 (2024).

²⁰ H.R. 595, 103rd Gen. Assemb., Reg. Sess. (Mo. 2025).

were, advocating together for a raise in the police chief's salary. The current cap was making it impossible to offer competitive compensation for what is, undoubtedly, one of the most challenging leadership positions in our community.

The joint advocacy proved powerful precisely because it was unexpected. When a progressive mayor and the police union president agree on something, people take notice. And it worked—we got the salary cap lifted, allowing us to attract the caliber of leadership our department needs.

VIII. THE CASE FOR PARTNERSHIP

This experience, and others like it, have led me to a sometimes-controversial conclusion: in today's political environment, cities *must* find ways to work with their states. It's not an option but an imperative. To some, this isn't an obvious position. There are compelling arguments for resistance, for fighting back, for standing firm on principle. And sometimes those approaches are necessary.

But consider the reality we face in Kansas City and beyond. With another Trump administration finding its footing, with Republican control in Jefferson City likely to continue, the path to improving our residents' lives runs through those who might be our political opponents. If we want to derive any benefit from the immense power and resources of the state and federal governments, our path to improvement runs through partnership, not confrontation.

Moreover, elected officials have a duty to do what they can within existing constraints. Our constituents can't put their lives on hold while we wage ideological battles. They still need housing, mental health services, transportation, and economic opportunity. They need us to find ways to deliver results within the system we have, even as we work to change that system.

Being in the room, at the table, means having more impact than shouting from the sidelines. Partnership on some issues doesn't prevent resistance on others. In fact, building relationships through cooperation can sometimes give you more credibility when you do need to oppose state actions.

IX. FRAMEWORK FOR PROGRESS

Through trial and error, success and failure, I've developed a framework for effective city-state collaboration. It's based not on academic theory but on what actually works—on getting things built, getting them built quickly, and getting them built together.

The framework has three core principles. First, **build, don't block**. Focus on creating new value rather than redistributing existing resources. Second, prioritize **progress over process**. Value speed and tangible results over procedural complexity. Third, ensure there's **enough for everyone**. Build in such a way that everyone can share in the rewards—not just in the tangible results like new housing or infrastructure, but also in the political recognition and credit that goes along with big successes.

A. Examining the Principles

Let's examine each principle in detail. Principle one, "build don't block" means focusing on creating new value. It's the difference between fighting over how to divide a pie and working together to bake more pies. When we frame issues in terms of growth and development rather than restriction and regulation, we often find unexpected allies.

The second principle—progress over process—might be the most challenging to implement. Government, especially at the local level, has developed layers upon layers of process requirements. Many serve important purposes: environmental protection, community input, labor standards. But we can reach a point where process becomes paralyzing.

I try to apply a "common sense" principle to figure out when we've veered to far into the "process," and aren't thinking enough about the "progress." Sometimes this leads me to part ways with some of my progressive colleagues. Take environmental review requirements. For developing pristine land or sensitive ecosystems, extensive review makes perfect sense. But when we're converting a defunct bowling alley into a mini golf course, or building housing on a former parking lot, do we really need the same level of scrutiny?

The challenge is systemic. Most public servants touch only a small portion of any project, so they can only be evaluated on their specific role in the process. A permit reviewer can't be judged on whether the building eventually gets built—they can only be judged on whether they properly reviewed the permit. In the aggregate, it means that nobody is individually to blame for the slow speed of progress, but the gears still wind up jammed. We need to find ways to tie everyone's incentives to the ultimate goal: getting things built.

The third principle—ensuring enough for everyone—operates on two levels. First, it's a fundamental belief about development and growth: we can actually build enough housing, enough transit, enough facilities to serve everyone's needs. This vision departs from the scarcity mindset that often dominates our politics and our government, where we assume there will never be enough to go around. Second, this principle applies to the political dynamics of city-state partnerships: there can be enough credit, enough recognition, and enough political wins to satisfy all partners. When we move from a mindset of scarcity to one of abundance, both in what we build and how we share the success, we create space for genuine collaboration. It requires dreaming big and then sharing the credit when those dreams are fulfilled.

B. Implementation Challenges

Implementing these principles isn't easy. The incentives in our political system often push in the opposite direction. For example, politicians are rewarded for announcing plans and showing renderings—not for the unglamorous work of shepherding projects through to completion.

There's also resistance from within progressive circles. Some view any cooperation with conservative state governments as capitulation. Others are so focused on perfect process that they lose sight of progress. I understand these

concerns—I share many of them. But I’ve learned that if we want to actually improve people’s lives, we need to be pragmatic about how we achieve our goals.

X. MODELS FOR EFFECTIVE COLLABORATION

Let me bring this back to where we started—the relationship between cities and states. While the legal framework remains challenging, experience has taught me that there are specific, practical ways that cities can work with their states to get things built. These approaches don’t require us to abandon our principles or ignore the reality of state preemption. Instead, they work within existing constraints to deliver real benefits for our communities.

I’ll share three models we’ve used successfully in Kansas City, each illustrating different ways to apply the principles I just outlined.

A. Model 1—Parallel Track Development

The first model is what I call “parallel track development,” where city and state pursue complementary but independent initiatives toward a common goal. Think of it as running on parallel tracks—separate but aligned, each powering the other forward.

Our 2026 FIFA World Cup preparations perfectly exemplify this approach. The city committed \$15 million to our host committee while the state simultaneously pledged \$50 million for Arrowhead Stadium renovations. We never directed their spending; they never directed ours. But each commitment reinforced the other, creating momentum that is helping ensure that the world’s largest sporting event will be a rousing success for Kansas City.

The parallel track approach works because it respects each government’s independence while leveraging their mutual interests. The state gets to support a major economic development initiative. The city gets to advance a transformative project. Most importantly, the community gets a better result than either government could deliver alone.

Parallel track development works best when projects are too big for any single entity to handle, when different governmental entities have distinct but complementary capabilities, and when maintaining separate processes actually speeds things up rather than slows them down. Sometimes, however, a project’s complexity necessitates closer coordination.

B. Model 2—Direct Partnership

The second model involves more direct collaboration between city and state governments. It’s for projects where success requires not just parallel action but genuine partnership—pooling resources, sharing authority, and working hand in hand.

The South Loop Link project exemplifies this approach. For those unfamiliar, the South Loop has long been a barrier in our downtown—a sunken

highway that divides neighborhoods and creates a concrete canyon in the heart of our city. The South Loop Link project will deck the highway, creating a new public park and reconnecting neighborhoods in our urban core.

This is a massive undertaking requiring multiple partners. We have federal support, thanks in no small part to former Senator Roy Blunt, whose name the park will bear. We have city investment and private sector participation. But the key partnership I want to highlight here is with our State and, in particular, state transportation department, MoDOT, through their Cost Share Program.

We recently learned that state highway authority matched our City's \$31.4 million commitment—their largest cost-share agreement ever in Kansas City. Both City and State money flow to the same organization and, because the project requires constant coordination between city and state officials, both governments are directly involved in planning and execution. It's so collaborative that the governor and I held a joint signing ceremony—a visible symbol of city-state partnership.

What makes this story particularly relevant is how it transcends political divisions. One of our strongest advocates for the State highway funds was a fairly conservative member of the Missouri Highway Commission. He saw beyond ideology to recognize how this investment would benefit both Kansas City and Missouri as a whole. He was far from alone—leaders of all political persuasions understood that this was in the best interests of Kansas City and Missouri and put their money where their mouth was to make this transformative project a reality.

Direct partnership works best when projects require shared authority, when pooling resources creates clear benefits, and when there's a strong foundation of trust between city and state officials. It requires more relationship building than parallel track development, but it can deliver uniquely powerful results.

C. Model 3—Cooperative Opposition

The third model might seem counterintuitive, especially to scholars of city-state relations but, as a mayor, I'm fortunate that my on-the-ground experience informs my legal scholarship. Remember all that preemption we discussed earlier? The legal framework that often feels stacked against cities? Sometimes it can actually help us build things. I call this approach "cooperative opposition"—where we actually *leverage* our different legal statuses to get things built faster. Let me show you how this works through the example of a state mental health hospital about to be built in Kansas City.

The state recently allocated \$300 million to build a new behavioral health facility in Kansas City—a crucial investment in addressing unmet mental health needs in our region. But despite having the money appropriated, the state hit multiple roadblocks. They aren't major landowners in Kansas City, aren't familiar with local land transactions, don't know the area well, and were limited by the purposes of their state appropriations.

The city identified a solution: adjacent parcels owned by our housing authority, parks system, and public schools. The City could acquire and assemble the land in a way the state couldn't. Using both our municipal power and our local knowledge and relationships, we navigated the complex negotiations needed to compile these parcels and solved the State's land-finding problem.

But here's where it gets interesting and where understanding preemption becomes crucial. If a private developer were building this facility instead of the State, even with city-donated land, they would have a long road ahead of them. They'd need rezoning approvals, environmental studies, workforce agreements, permit applications, possible consultation with Native American tribes if federal money were used—the list goes on. The land transfer would be just the beginning.

But because *the state* will develop the property, the land transfer is basically the end of the line. Almost none of those processes apply. Because states are legally superior to cities, state projects aren't subject to city zoning requirements, don't need city permits, don't pay city taxes, and aren't bound by city workforce rules. The very preemption that often frustrates cities becomes a tool for faster development.

The result? Kansas Citians will get much-needed mental health services far sooner and more cost-effectively than they otherwise would have. It's the supreme power of the state, channeled through city interests, delivering tangible benefits for our community.

XI. CONCLUSION—THE POWER OF TANGIBLE PROGRESS

Let me close by returning to where we started. Yes, the legal framework governing city-state relations—from Dillon's Rule through new preemption and post-emption—can seem hopelessly stacked against cities. The current political climate only intensifies these challenges.

But focusing solely on legal barriers misses the opportunity before us. When we focus on building things—real, tangible improvements in people's lives—we often find partners in unexpected places. Whether it's mental health facilities, park space over highways, or world-class sports venues, **progress creates possibilities.**

Cities should stay staying focused on what matters: getting things built. The measure of our success isn't the elegance of our process or the purity of our politics—it's the tangible improvements we deliver for our communities. When we do that successfully, we often find that what seemed like intractable political conflicts were really just problems waiting to be solved.

This requires a different approach to city leadership. It means building relationships before you need them, like our regular engagement with Governor Kehoe. It means leveraging local business communities as bridges to state government, which we do by, for example, working with the Chamber of Commerce to identify palatable candidates for our Board of Police Commissioners. It means being willing to share credit and celebrate collective wins.

Looking ahead, opportunities for this approach abound. The new Trump administration will have around \$300 billion in Inflation Reduction Act funds to award. While Kansas City, might struggle to compete for those dollars directly, partnership with the state—even a state government that differs from us ideologically—might secure those investments for our community.

The framework I've outlined today—focusing on building rather than blocking, prioritizing progress over process, and ensuring enough for everyone—

offers a path forward for cities in challenging political environments. It suggests that the best response to hostile preemption isn't just resistance, but redirection toward shared goals that benefit our communities.

Thank you all for your attention today. I look forward to your questions and to seeing how you, the next generation of lawyers and policy makers, build on these ideas to create even better frameworks for city-state cooperation.

PROPERTY VALUES: ACCOUNTING FOR RACIAL VALORIZATION AND STIGMATIZATION IN DEVELOPMENT

*By: Audrey G. McFarlane**

My talk was originally intended to focus on wealth inequality and how it affects equitable development and represented my effort to get away from race and focus on wealth. Of course, it is not really possible to get away from race when talking about wealth. In light of where the current public conversation has been going in terms of race, it seems like it is on a trajectory that it may be the case that one day my talk will be prohibited because it uses certain terms that are currently being prohibited. Thus, it occurred to me that it would be important to talk very specifically at this conference about the future of cities, about how and why race matters in development, and to do it in a way that is different than how we normally talk about race.

The vast majority of us talk about race in terms of individual bad actors making bad decisions based on a corollary assumption that colorblindness is the ultimate goal. Thus, talking about race violates these assumptions that we should not see race nor acknowledge anything that we in fact may actually be noticing. Despite our actual perceptions about race, we pretend we can just avoid reality altogether. So, what I would like to do is to explain or talk about race, not in an individual context as an individual bad actor with a bad state of mind, which is pretty much how our law focuses on it, but to talk about how race has intersected with how we have organized this country, how we have conducted development, and how we have constructed property rights. What I would like us to focus on is something more than just the individual state of mind. This is not about identifying bad actors or bad people making bad decisions. Rather, this presentation's purpose is to acknowledge consistent patterns that have been with us since we came up with this imaginary idea of something called "race."

Race is imaginary. It is a concept to which we have ascribed social meaning, and we have attributed certain characteristics based on how someone appears. But this attribution is actually imaginary: it is socially constructed through

* Dean Julius Isaacson Professor of Law, University of Baltimore School of Law. This article presents a lightly edited transcript of a presentation from the symposium: "Cities of Tomorrow: Legal Approaches to Urban Health and Sustainability." This symposium was held on February 28, 2025, at the University of Kansas and sponsored by the *Kansas Journal of Law & Public Policy*.

social and legal practices.¹ It is very real, however, to the extent that these imaginations have real impacts and have shaped how we think about problems, how we construct what goods and services we provide for members of our society, and how we think about resolving conflicts. So, in order to think about race beyond the individual and beyond the imaginary, think systematically. Think about patterns and every time I mention something that seems destructive or disadvantageous, consider the advantages provided by those same actions.

To begin, when we think about race and racial inequality, we have a fairly massive wealth gap between the typical Black family whose net worth is about \$17,000, and the typical White family whose net worth is about \$171,000 dollars.² Of course, these numbers vary in terms of individual real-world experiences as people fall in different places along these lines, but overall, there is a large wealth gap between Black and White families.³ This wealth gap has been so consistent that many of us just think it is kind of natural, that it is a reflection of individual efforts, commitment, and doing the right things versus doing the wrong things.

Critical race theory is one of those terms that has been recently bandied about irresponsibly in the media. It has been vilified and so I thought I would explain what exactly critical race theory is.⁴ Critical race theory is a collection of insights by legal scholars that then spread to other disciplines to look at what exactly racism is and how it manifests in legal doctrine and practices.⁵ Racism is something that is deeply embedded in our consciousness, in our institutions, and in our systems. It is not necessarily an aberration; it is actually kind of a consistent, purposeful tool. It is important to speak up about different perspectives and about the way that we view how resources are distributed in society. It is also a critique of liberalism—specifically economic liberalism—in the sense that it questions the belief that creating markets, systems, and practices that are colorblind and neutral will suffice, and that any correction to existing disparities must occur incrementally and gradually.⁶ So, there is a critique of the concept of meritocracy, in the sense that there is more to what we measure in terms of merit than we typically pay attention to. There is also some scholarship about the concept of whiteness and how that has been protected in law as a property right to the extent that it provides tangible and material benefits.⁷ There is a bit of a cynical perspective which says that if you are trying to achieve racial justice, those efforts will cease if it is perceived that the interests of Whites are placed, or perceived to be placed, in danger. So critical race

¹ Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 11 (1994); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1713 (1993).

² Kriston McIntosh, Emily Moss, Ryan Nunn, & Jay Shambaugh, *Examining the Black-white Wealth Gap*, BROOKINGS (Feb. 27, 2020), <https://www.brookings.edu/articles/examining-the-black-white-wealth-gap/> [<https://perma.cc/NC99-ADXG>].

³ See *id.*

⁴ See Kevin Brown, *Critical Race Theory Explained by One of the Original Participants*, 98 N.Y.U. L. REV. ONLINE 91 (2023).

⁵ See RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 2–3 (2d ed. 2012); Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1260 (2011).

⁶ See DELGADO & STEFANIC, *supra* note 5, at 3.

⁷ See, e.g., López, *supra* note 1, at 3–4; Harris, *supra* note 1, at 1720–21.

theory is a way of saying let's look beyond our practices and look beneath them—look more deeply.

Derek Bell was, really, the creator of critical race theory.⁸ I just summarize here some of his observations and insights about how it requires an interest conversion between the interests of Whites in society at large in order for Blacks to obtain advancement in their interests. He cites to the Emancipation Proclamation and the Civil War Amendments—the Thirteenth, Fourteenth, and Fifteenth amendments—coinciding with a way of saving the Union from the strife of the Civil War.⁹ Similarly, *Brown v. Board of Education* is, he argues, a reflection of, or an outcome of, the Cold War and how it was important to the United States to present to the world, and in particular, the communist nations, that the capitalist approach could be fair and equitable.¹⁰ So, Bell noted these convergences exist whenever we see racial progress. But he argues that interest convergence does not work to the extent that Black interests are perceived as being advanced to the disadvantage of White interests.¹¹ One of the key observations and the most compelling yet controversial of Professor Bell's statements is his point that racism is permanent.¹² People have found that a very despairing thing. But he says we need to acknowledge that racism is permanent in order to realistically think about how to strategize around some of its negative effects.¹³

Another observation about race and development is the concept of racial capitalism. Racial capitalism is based on an observation by Cedric Robinson, who said that capitalism is actually based on needing a difference between people in order to make a profit.¹⁴ Capitalism relies upon a difference in knowledge. It relies upon a difference in economic situation. Robinson argued that those differences were first practiced in Europe on other Europeans.¹⁵ Perhaps the English versus the Irish would be an example of behavior where one group of people treats another group differently in order to gain economic advantage.¹⁶ Robinson argued that this hierarchical economic structure is where race was born to create a venalized, exploitable group versus a venerated group.¹⁷ Racial capitalism is the notion that we

⁸ See generally Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992).

⁹ Derrick Bell, *supra* note 8, at 372, 376.

¹⁰ Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524–25 (1980).

¹¹ *Id.* at 523.

¹² See Derrick Bell, *supra* note 8, at 377.

¹³ See *id.* at 377–78.

¹⁴ See CEDRIC ROBINSON, *BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION* 27 (1983).

¹⁵ *Id.* at 10.

¹⁶ *Id.* at 45.

¹⁷ Jodi Melamed, *Racial Capitalism*, 1 CRITICAL ETHNIC STUDS. 76, 77 (2015).

need to have this gap, and we need to have this difference, and race is what we use to produce and maintain that gap and difference.¹⁸

I did research on slavery, and I am currently writing about race and its influence on property. I will admit I did not know that something like our estates in land and future interests, our life estates, things where co-owners today can bring actions for waste—all of those property doctrines were used on enslaved people who were held as chattel property.¹⁹ In one waste case, for example, someone purchased a widow's life estate in a slave and allowed the enslaved person to be independent, to go out and work and keep the money they earned.²⁰ The children who held the remainder interest to the life estate were unhappy about this and were able to sue successfully that such independence constituted waste because the life estate holder failed to subordinate and oppress the slave to ensure that all enslaved persons understood that they held second degree, subjugated status.²¹

I mentioned slavery as the origin of the use of the terms “Black” and “White.”²² We used Black and White as concepts to distinguish who suffers from oppression, who is rewarded with liberation, and who should have agency. We continued that system until we had a conflagration, the Civil War, and we abandoned it because there was great discord in society over the institution of slavery. Then we had a period of reconstruction, which did not last very long. It lasted about eleven years. After that, we had a period of Jim Crow for nearly one hundred more years.²³ I wonder if we are now on the cusp of the end of what I would say is our second reconstruction brought on by the Civil Rights Acts of the 1960s. We also reinvigorated statutes that had been originally passed in the 1860s. We set about on a liberation, and it seems to me that our challenge right now is whether the gains made by Blacks is something that we will denigrate by calling it “DEI.” That is just a question to keep in mind.

After slavery, we have a history of formerly enslaved people, now mobile, free to move, free to work, free to support themselves, not given any assistance to transition from their enslaved state to their free state. Our efforts have been, with respect to development, focused on containing the movement of these people. Starting in the 20th century, we see various iterations of efforts made to what I call “racializing space,” which is to designate where people should live based on their racial identity. The result of it is, for example, Baltimore's redlining map. What we have ended up with is a system where we have concentrated poverty in many urban

¹⁸ See *id.*; Carmen Gonzales & Athena Mutua, *Mapping Racial Capitalism: Implications for Law*, 2 J. L. & POL. ECON. 127, 131 (2022).

¹⁹ See *Ellis v. Shell*, 4 S.C. Eq. 611, 611–13 (1815); see generally Justin Simard, *Citing Slavery*, 72 STAN. L. REV. 79 (2020).

²⁰ *Worthington v. Crabtree*, 58 Ky. 478, 481 (1858).

²¹ *Id.* at 481–82.

²² See Luther Wright Jr., *Who's Black, Who's White, and Who Cares: Reconceptualizing the United States's Definition of Race and Racial Classifications*, 48 VAND. L. REV. 513, 521 (1995).

²³ See Darrell A. H. Miller, *White Cartels, the Civil Rights Act of 1866, and the History of Jones v. Alfred H. Mayer Co.*, 77 FORDHAM L. REV. 999, 1024, 1036 (2008).

places and concentrated affluence. We usually talk about concentrated poverty; we do not really talk about concentrated affluence.²⁴

Baltimore was the site of the first racial zoning ordinance in 1910. The city used its police powers, powers that are analogous to saying its policy powers, to designate who could live in which city blocks.²⁵ Why did they do this? Because there was a Black lawyer who moved into an area that was perceived to be upscale and White, and the city wanted a way to prohibit that kind of movement.²⁶ At the time, the city's actions in passing this ordinance were considered so extraordinary it caused the New York Times to send a reporter down in Baltimore to see what was going on there.²⁷ The resulting news story is very interesting as to how all the players talked about what this racial zoning ordinance meant to them.²⁸ George McMechen, the Black lawyer whose move into a white, upscale neighborhood prompted the agitation for and passage of the racial zoning legislation highlighted that his intention was not to force social integration but to seek more comfortable living conditions.²⁹ McMechen also pointed out that Blacks were paying higher rents than the previous White occupants, challenging the White residents' fears that the presence of Black residents would devalue White properties.³⁰

Racial zoning was declared unconstitutional using Louisville's racial summing ordinance in a case called *Buchanan v. Warley*.³¹ After *Buchanan* was adopted, Baltimore, St. Louis, and other cities that had these racial zoning ordinances quickly met to form committees for segregation and come up with ways that they could continue to enforce segregation.³² Before *Buchanan*, but certainly after and since 1917, we started using our land ownership system to adopt racially restrictive covenants in our land and in our deeds.³³ They were adopted all over the United States, everywhere from Seattle, Chicago, Austin, and who would be prohibited would be based on who was the local out group in the particular community.³⁴ I have

²⁴ See Edward G. Goetz, Anthony Damiano & Rashad A. Williams, *Racially Concentrated Areas of Affluence: A Preliminary Investigation*, 21 CITYSCAPE 99, 100 (2019).

²⁵ See David Friedman, *Baltimore Tries Drastic Plan of Race Segregation*, SUNDAYMAGAZINE.ORG (Dec. 24, 2010), <https://sundaymagazine.org/2010/12/24/baltimore-tries-drastic-plan-of-race-segregation/> [<https://perma.cc/HEG3-V4UK>].

²⁶ *Id.*

²⁷ See generally *id.*

²⁸ See generally *id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Buchanan v. Warley*, 245 U.S. 60, 82 (1917).

³² See Christopher Silver, *The Racial Origins of Zoning in American Cities* in URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY: IN THE SHADOWS 23, 24 (1997).

³³ See *id.* at 25.

³⁴ See Catherine Silva, *Racial Restrictive Covenants History: Enforcing Neighborhood Segregation in Seattle*, UNIV. OF WASH. (2009), https://depts.washington.edu/civilr/covenants_report.htm [<https://perma.cc/S9Q8-RQ6A>]; Arnold R. Hirsch, *Restrictive Covenants*, ELEC. ENCYCLOPEDIA OF CHI., <http://www.encyclopedia.chicagohistory.org/pages/1067.html> [<https://perma.cc/4GQ2->

an example of a covenant that included Armenians, Jews, Hebrews, Persians, and Syrians.³⁵ The list of who would be excluded would vary. Consistent, however, is every one of these racially restrictive covenants would include Blacks.

Redlining. [Posing a question to the audience.] Would anyone be willing to admit they do not know what redlining is? During the Great Depression, we had millions of foreclosures, and the government got involved in creating something radical. That radical new type of loan was the thirty-year fixed interest loan.³⁶ It was radical because if I asked you to borrow money, would you give me thirty years to pay you back? The redlining maps were the federal government's way of assuring, first, that they were going to insure the mortgages, but also that those mortgages would be safe.³⁷ Racial concepts of the time were used to define what was a safe neighborhood and what was safe was racial homogeneity. The federal government felt that racial mixing of any kind was unstable and would not contribute to high property values. These residential security maps were drafted and created for every city and place in the United States as a way of guiding underwriting decisions.³⁸ It is these originally redlined areas that manifest problems in cities today like low property values, high infant mortality, and higher crime rates. But what we do not often talk about are, well, what about the greenlined areas? The greenlined areas received an incredible benefit under this system. They received the benefit of cheap financing to purchase homes, and the cheap financing was predicated on race. The fact that it was predicated on race meant that access to home ownership was given to lower income working class people based on race. Today's kind of upper income trend toward White people was created using this system by giving exclusive access to home ownership. This example of redlining and home financing highlights the importance of looking not only at discriminatory practices but also at the benefits resulting from such practices.

There are also many indirect practices that accompanied redlining.³⁹ Professor Bratspies's specialty in environmental justice exists largely because zoning, which is a legal system of land regulation, was allowed to repeatedly locate toxic uses near Black neighborhoods.⁴⁰ Where we decided to build highways was

AT3U]; Moulay Anwar Sounny-Slitine, *Racially Restrictive Covenants in Austin, Texas*, YOUTUBE (Jul. 16, 2021), <https://www.youtube.com/watch?v=0k6x0BQxb68> [<https://perma.cc/WTS6-6JTY>].

³⁵ Justin Wm. Moyer, *Racist Housing Covenants Haunt Property Records Across the Country. New Laws Make Them Easier to Remove*, WASH. POST (Oct. 22, 2020), https://www.washingtonpost.com/local/racist-housing-covenants/2020/10/21/9d262738-0261-11eb-8879-7663b816bfa5_story.html [<https://perma.cc/VH6J-B699>].

³⁶ Todd Zywicki, *The Behavioral Law and Economics of Fixed-Rate Mortgages (and Other Just-So Stories)*, 21 SUP. CT. ECON. REV. 157, 158 (2014).

³⁷ See generally *Mapping Inequality: Redlining in New Deal America*, UNIV. OF RICH., <https://dsl.richmond.edu/panorama/redlining> [<https://perma.cc/5Y37-HPTL>] [hereinafter *Mapping Inequality*]; Todd M. Michney, *How the City Survey's Redlining Maps Were Made: A Closer Look at HOLC's Mortgagee Rehabilitation Division*, 21(4) J. PLAN. HIST. 316, 326–27 (2022).

³⁸ See *Mapping Inequality*, *supra* note 37 (containing residential security maps for 200 U.S. cities).

³⁹ See Silver, *supra* note 32, at 38.

⁴⁰ Professor Bratspies also presented at the *Kansas Journal of Law and Public Policy* Spring 2025 Symposium. Her presentation can be found at page 285 of this publication.

based on race.⁴¹ Where and how we decided to build public housing was based on race.⁴² How we decided to locate schools, parks, and other public facilities was based on race.⁴³ How we designated places as slums to be torn down was based on race.⁴⁴

To give you a small example from Baltimore, there was actually a mixed neighborhood because, before this intervention, there was mixing in neighborhoods.⁴⁵ The mixed neighborhood had been considered a problem by the local government and so the city used federal urban renewal funds to tear down the mixed neighborhood, build homes, designate them for White residents, and then the public housing that was built was designated for Blacks.⁴⁶ This chart here shows Baltimore's efforts to address a very significant problem of vacant and abandoned housing.⁴⁷ If you look at which areas received an "A" rating—and thus were more likely to receive the city's attention and funding—those are the areas that were "greenlined."⁴⁸ By contrast, the areas marked in peach tones, which are harder to distinguish on the map, tend to be located toward the center of the city and have been described in the work of a local researcher, Lawrence Brown, as the "Black Butterfly."⁴⁹ This "Black Butterfly" is the area where the city has said those are the areas that we cannot focus on right away because market conditions will not allow it, even though the market was created by or influenced by racial decisions earlier.⁵⁰

Earlier, I mentioned concentrated affluence and racially concentrated poverty. We are focused on the concentrated poverty, but less so on the concentrated affluence. As we are experiencing significant gentrification in certain areas, which is accompanied by displacement and transition, we end up with concentrated affluence in many places where it just was not considered possible, but the concentrated poverty is still something that continues as a problem. In fact, there have been many studies done on gentrification.⁵¹ There was a study done in Chicago that showed that it was not necessarily any investments or amenities that determined

⁴¹ Silver, *supra* note 32, at 38.

⁴² *Id.*

⁴³ *Id.* at 37.

⁴⁴ *Id.* at 38.

⁴⁵ See Arnold R. Hirsch, *Searching for a "Sound Negro Policy": A Racial Agenda for the Housing Acts of 1949 and 1954*, 11 HOUS. POL'Y DEBATE 393, 411 (2000).

⁴⁶ *Id.*

⁴⁷ DEP'T OF PLANNING, *Baltimore City's 2017 Housing Market Typology*, CITY OF BALTIMORE, https://planning.baltimorecity.gov/sites/default/files/distFINAL_HMT2017_11x17_0518.pdf [<https://perma.cc/FK3S-LTFZ>].

⁴⁸ *Id.*

⁴⁹ *Id.*, LAWRENCE T. BROWN, *THE BLACK BUTTERFLY: THE HARMFUL POLITICS OF RACE AND SPACE IN AMERICA* 9 (2021).

⁵⁰ See BROWN, *supra* note 49.

⁵¹ See, e.g., Goetz et al., *supra* note 24, at 100, JOE CORTRIGHT & DILLION MAHMOUDI, *LOST IN PLACE: WHY THE PERSISTENCE AND SPREAD OF CONCENTRATED POVERTY—NOT GENTRIFICATION—IS OUR BIGGEST URBAN CHALLENGE* 3–4 (2014).

where gentrification would happen.⁵² It was literally the presence of White people moving into the area, which was used as the marker to interpret whether or not an area is worthy of investment,⁵³ worthy of building, worthy of getting that first Starbucks, the Whole Foods and not the Dollar General or the Save-a-Lot, which are some of the grocery stores in Baltimore.

On that topic, I want to mention how the market decides where everything goes. Why does one area get a Nordstrom, and another area gets a Dollar General? It is based on something called “Geodemographic Profiling.”⁵⁴ This method of spatial analysis uses ZIP Codes and other data as ways to measure the economic wealth in the community, the racial identity of the community, and data to create a demographic assessment of what types of development should take place.⁵⁵ You can see the names for the different labels that different areas get if you go to the Claritas PRIZM website and type in your ZIP code to see what your classification is.⁵⁶ Under the Geodemographic Profiling, they use these assessments to determine where to make investments.

Another way in which race shaped development and segregation was also this phenomenon of something called sundown towns, which were areas that declared that Blacks, Latinos, or Native Americans, but typically Blacks, needed to be out of their towns by sundown.⁵⁷ These were racially hostile places that maintained themselves as all White.⁵⁸ The data on this slide is from Illinois.⁵⁹ There is a website where you can also look and see where these sundown towns were.⁶⁰ They are harder to identify because some of them had signs that said it explicitly, but many of them did not.⁶¹ The author, James Lowen, used different demographic ways of assessing which areas were likely sundown towns.⁶²

⁵² Jesse Mumm & Carolina Sternberg, *Mapping Racial Capital: Gentrification, Race and Value in Three Chicago Neighborhoods*, 59(3) URB. AFFS. REV. 794, 823–24 (2023).

⁵³ *Id.* at 823–24.

⁵⁴ See Audrey G. McFarlane, *Who Fits the Profile?: Thoughts on Race, Class, Clusters and Redevelopment*, 23 GA. ST. U. L. REV. 877, 879 (2007).

⁵⁵ See generally *Identify Syndicated Audience Segmentation*, CLARITAS, <https://www.claritas.com/syndicated-audiences/> [https://perma.cc/3E76-G9EY].

⁵⁶ *ZIP Code Look-up*, CLARITAS, https://claritas360.claritas.com/mybestsegments/?_ga=2.163827325.310384874.1742951083-726082120.1742951083#zipLookup [https://perma.cc/Z63V-T8RH].

⁵⁷ JAMES W. LOEWEN, *SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM* 4 (2005).

⁵⁸ *Id.*

⁵⁹ See generally *Location: Illinois*, HIST. & SOC. JUST., <https://justice.tougaloo.edu/location/illinois/> [https://perma.cc/AQ4D-EK2G].

⁶⁰ See generally *Historical Database of Sundown Towns*, HIST. & SOC. JUST., <https://justice.tougaloo.edu/sundown-towns/using-the-sundown-towns-database/state-map/> [https://perma.cc/J6GR-6KAN].

⁶¹ See LOEWEN, *supra* note 57, at 193–95.

⁶² See *id.* at 379–420 (documenting how thousands of towns across the United States systematically excluded Black residents—often through violence, threats, and policy. Uses demographic data, including the near-total absence of Black people to reveal patterns of anti-Black exclusion that persisted long after formal segregation ended); see generally WUSA9, *What are Sundown Towns and Do They Exist in the DMV? Leading Expert Says “Yes”*, YOUTUBE (June 4, 2021), <https://www.youtube.com/watch?app=desktop&v=2QEIGnmTPtc> [https://perma.cc/MTH7-XT3R].

One manifestation of all of this racial decision-making has been in property values and in particular, how subjective property values are. It turns out that there is a dual problem. The first part of the problem is the undervaluing of black-owned properties when it comes to assessments, if you are either trying to sell or trying to refinance.⁶³ There have recently been quite a number of stories in the media of appraisals that grossly undervalued the properties.⁶⁴ There is the case of Nathan Connolly, a professor at Johns Hopkins in Baltimore, who called an appraiser and got a value that was several hundreds of thousands of dollars below what he knew was the prevailing price in the neighborhood, the fair market value.⁶⁵ So, the Connollys concealed their identity as Black people, took away all their photos, any indicia of their racial identity, got a White colleague to stand in for them and the property values shot up by more than \$200,000.⁶⁶ This undervaluation happens quite frequently and there is a lot of work being done on property appraisals to look at how those original redlining maps and that decision-making are still being manifested in discretionary aspects of property appraisal. When a property appraiser comes to a parcel and sees who the owner is, how does that affect their property value assessment? On the flip side, there is the second part of the problem regarding property tax appraisals.⁶⁷ Somehow, those appraisals are overvalued meaning that properties owned by Blacks are over-assessed.⁶⁸ There have been some studies done about what the causes of this are. A number of authors argue that Blacks do not challenge or do not win property assessments as often and so there is work to be done on that.⁶⁹

⁶³ See ANDRE PERRY, JONATHAN ROTHWELL & DAVID HARSHBARGER, *THE DEVALUATION OF ASSETS IN BLACK NEIGHBORHOODS: THE CASE OF RESIDENTIAL PROPERTY*, BROOKINGS 15 (2018), https://www.brookings.edu/wp-content/uploads/2018/11/2018.11_Brookings-Metro_Devaluation-Assets-Black-Neighborhoods_final.pdf [<https://perma.cc/S79H-KED7>].

⁶⁴ E.g., Jonathan Edwards, *A Black Couple Says an Appraiser Lowballed Them. So, they "Whitewashed" Their Home and Say the Value Shot Up*, WASH. POST (Dec. 6, 2021) <https://www.washingtonpost.com/nation/2021/12/06/black-couple-home-value-white-washing/> [<https://perma.cc/B39X-9ZYP>]; Alexandria Burris, *Black Homeowner Had a White Friend Stand in for Third Appraisal. Her Home Value Doubled*, INDIANAPOLIS STAR (May 13, 2021, 5:53 AM), <https://eu.indystar.com/story/money/2021/05/13/indianapolis-black-homeowner-home-appraisal-discrimination-fair-housing-center-central-indiana/4936571001/> [<https://perma.cc/G3DX-78GR>].

⁶⁵ See Debra Kamin, *Lawsuit Alleging Racial Bias in Home Appraisals is Settled*, N.Y. TIMES (Mar. 25, 2024) <https://www.nytimes.com/2024/03/25/realestate/racial-bias-appraisal-settlement.html> [<https://perma.cc/6NJZ-5Y5D>].

⁶⁶ *Id.*

⁶⁷ KIRWAN INST., FRANKLIN COUNTY AUDITOR REPORT: INVESTIGATING THE APPRAISAL PROCESS 5 (2021), <https://franklincountyauditor.com/AUDR-website/media/Documents/Community%20Relations/In%20the%20News/Kirwan-Institute-Franklin-County-Auditor-Report-Investigating-the-appraisal-process.pdf> [<https://perma.cc/N2FD-7K3Y>].

⁶⁸ *Id.*

⁶⁹ Carlos Avenancio-León & Troup Howard, *The Assessment Gap: Racial Inequalities in Property Taxation* (July 2021) (unpublished manuscript), <https://www.maxwell.syr.edu/docs/default->

I wanted to close by talking about *Sex and the City*, which was a great TV show in the early 2000s. There was a scene that stuck in my mind. In this scene, Miranda was looking for an apartment for herself and her son somewhere in lower Manhattan, in an area that was formerly Ukrainian, and, in the midst of the crowd, Miranda saw a White guy with a baby heading toward a building. As she herself was looking for a suitable vacancy, Miranda declared, “wherever he’s going, that’s where we need to be.”⁷⁰ If we look at this scene using the individualistic approach, we would say, oh, she should not have done that. She should not have noticed that he was White and made that the basis of her decision. Whereas, if we look at it on a more structural level, we would say she was actually making a correct assessment that there was racial change happening in the neighborhood and that she could use his identity as the guideline of where she would feel safe or comfortable.⁷¹ And if she, the individual apartment or condo seeker uses this as a guideline, how do landlords decide who to rent to or to evict? How do developers decide what types of buildings to build and where to locate them? How do cities decide which areas to rezone, which projects to greenlight and which to ignore? So, it is this notion that race in development has created consistent patterns of racial stigmatization and valorization. It reflects the stigmatization of Blacks and affects how property decisions are made either directly or indirectly. It also reflects how whiteness is valorized which affects decision making directly.

I will close with Toni Morrison, who has argued that both whiteness and blackness have served as a social glue.⁷² The concepts provide an identifying indication of how to make distinctions. It is a unifying force creating insider and outsider sets of identities. That means that it is wholly consistent that when new immigrants come to the United States, they quickly assess where on that whiteness or blackness divide they would like to fall which thus replicates the dynamic. That means that none of the work that we do with respect to cities can ignore this history. Race is consistently, persistently, and purposefully pursued as a basis of decision-making. It is embedded in our geography and the ways that we do things. Our challenge is to keep aware of this and use it to inform all of our policies and to think through all of our policies in terms of what we think people are entitled to, what we think makes a good community, and what trade-offs we may need to make from what seems ideal to ensure that it is actually, at the very least, inclusive. Repairing some of what race has been used to do would be wonderful. But at the very least, ensuring that it does not persist going forward in shaping our cities of the future is also important, so thank you.

source/research/cpr/property-tax-webinar-series/2021-2022/howard-the-assessment-gap.pdf [https://perma.cc/352R-Q982]; See generally Randall K. Johnson, *Who Wins Residential Property Tax Appeals?*, 6 COLUM. J. TAX L. 209 (2015).

⁷⁰ *Sex and the City: The Movie* (Warner Bros. Pictures 2008).

⁷¹ See Mumm & Sternberg, *supra* note 52, at 823–24.

⁷² See Bonnie Angelo & Toni Morrison, *Toni Morrison: The Pain of Being Black*, TIME (May 22, 1989, 12:00 A.M.), <https://time.com/archive/6702572/toni-morrison-the-pain-of-being-black/> [https://perma.cc/NGU2-MVG2].

STRONG TOWNS: A BOTTOM-UP REVOLUTION TO REBUILD AMERICAN PROSPERITY

*By: Chris Allen**

I. INTRODUCTION

I'm going to give a presentation about Strong Towns: A Bottom-Up Revolution to Rebuild American Prosperity. Someone told me it was a great title, and I will publicly own that I did not write it. What is Strong Towns and what are we here to do? The point of this symposium today is to talk about the cities of tomorrow. To talk about the cities of tomorrow, I am going to ask us to take a step back and talk first about the cities of yesterday.

What is Strong Towns? I promise I will get to the cities of tomorrow here in a moment. For those who do not know, Strong Towns is a nonprofit organization seeking to replace America's post-war pattern of development, which we call the suburban experiment, with a pattern of development that is financially strong and resilient. Our hypothesis is that the car-dependent suburbs and the suburban pattern of development that we have seen post-World War II is directly reflected in the balance sheets of our cities today. Many of the problems communities face today can be attributed to cities deciding to spread people out four, ten, twenty times farther than we have ever been spread out in human history. We have drastically increased the average feet of pipe, sidewalk, and street frontage per person that cities are required to maintain forever.

To further Mayor Lucas's point, we earnestly believe that local government is the highest level of collaboration for people working together in a place and not merely the lowest level of government. We believe that lasting change for actual people can be enacted at the city level. Our state and federal conversations around what we should or should not do has devolved into partisan attacks and sound bites that are not doing anything for anyone besides trying to help politicians win reelection.

Strong Towns believes that cities are where individuals can affect the most positive change for their communities. And as I am sure most of you are feeling right now, change is needed in many of our communities. To that end, Strong Towns has

* This Article presents a lightly edited transcript of a speech from the symposium: "Cities of Tomorrow: Legal Approaches to Urban Health and Sustainability." This symposium was held on February 28, 2025, at the University of Kansas School of Law. The *Kansas Journal of Law & Public Policy* sponsored the event. Chris Allen is the Director of Events and Partnerships at Strong Towns.

five core campaigns we believe will help us build prosperous cities. They are ending highway expansion, transparent local accounting, incremental housing, safe and productive streets, and ending all parking mandates and subsidies.

Much of what the previous speakers presented on today was ongoing attempts to fix the deep systemic damages of urban renewal. This brings us to the first Strong Towns campaign: ending highway expansion. In many cities, much of the damage that was done in redlined neighborhoods was not limited to restricted financing for home mortgages. Instead, cities all over America bulldozed homes and built highways over them in redlined areas. There are generations of minorities in this country who had systematically built wealth that cities stole when the cities bulldozed their homes and built highways in the middle of their communities.

Another one of our core campaigns is transparent local accounting. This is one of the conversations I end up having most frequently with communities. In most city budgets, streets are counted as assets instead of liabilities.¹ Road maintenance is one of a city's largest costs. When you combine roadway maintenance and sewer maintenance and repair, these liabilities are one of the largest ongoing expenses a city will have. And yet in most city budgets, roads are counted as assets instead of liabilities. We have completely thrown city finances out of whack. This is another example of a system that is built to obfuscate the truth so that we do not have to deal with the hard facts in our communities. The majority of our cities are insolvent, and we are spending ourselves into infinite debt.

Additionally, Strong Towns ardently supports incremental housing. We know that we are in a housing crisis here in America and the only solution to the housing crisis is to build more resilient housing. We earnestly argue that we have the data and experience to prove that infill incremental housing utilizing existing infrastructure is the most efficient and effective way for cities to improve housing choice and decrease housing costs. I will also say anecdotally that the only way communities can fight gentrification is by local ownership of those properties, which is almost exclusively done by incremental and infill developers.

Our fourth core campaign is safe and productive streets. Strong Towns believes that safe and productive streets are foundational to economic health in a community. Our organization has engaged with many anti-car groups and disability advocates. The Strong Towns position is not anti-car. Our position is pro-person and pro-community. The Safe Streets movement is no longer simply about enjoying walkable cities. We know that the math for walkable cities is unquestionably better than the math for cities that require you to drive your car to go shopping and meet basic human needs.²

¹ Charles Marohn, *Is a Street an Asset?*, STRONG TOWNS Aug. 19, 2014), <https://www.strongtowns.org/journal/2014/8/19/is-a-street-an-asset.html#:~:text=Roads%2C%20streets%2C%20sewer%20and%20water,and%20debt%20in%20the%20latter> [<https://perma.cc/2UUR-STG6>] (“Roads, streets, sewer and water systems and other infrastructure are generally considered to be assets. When cities account for their assets and liabilities in their audits, infrastructure is counted in the former and debt in the latter.”).

² See Lisa Chamberlain, *Why Walkable Urban Areas are America's Efficient Economic Engines*, WORLD ECON. F. (March 1, 2023), <https://www.weforum.org/stories/2023/03/why-walkable-urban-areas-are-america-s-efficient-economic-engines/> [<https://perma.cc/Y5UV-XYSE>].

Last but not least, Strong Towns's fifth core campaign, and perhaps the easiest one to implement, is ending all parking mandates and subsidies. Parking mandates, also known as parking requirements or parking minimums, are regulations that dictate a specific number of parking spaces for developments, housing, and businesses. Parking mandates are one of the most pernicious limiting factors to growth that you will find in your community, and it is something no one talks about, or at least talks about enough. Removing parking requirements is a necessary step in allowing increased economic opportunity in every community.

So how do cities begin to implement these campaigns? Strong Towns has advice that we are sharing through articles and podcasts, local conversations, our thriving membership program, and training programs for city staff and technical professionals. What started off with our founder Chuck Marohn's blog over ten years ago is now a movement that touches millions annually through our blogs, videos, and podcasts. We continue to be surprised at the reach and impact of our work.

II. THE TIME-TESTED PATTERN OF GROWTH



Figure 1: Photograph of Brainerd, Minnesota in 1870, in Daniel Herriges, *Neighborhoods Were Never Meant to be Unchanging*, STRONG TOWNS (June 23, 2022), <https://www.strongtowns.org/journal/2022/6/23/neighborhoods-were-never-meant-to-be-unchanging> [<https://perma.cc/MK9S-VLQD>].

To understand Strong Towns's work and outreach, we will first talk about a city. This is Brainerd, Minnesota. This is where Chuck Marohn, our founder, was born and where his family has lived since almost 1870. What you see here is natural human habitat. This is how all our cities were constructed, how everyone lived through the entirety of human history. Some people found a clearing in the woods, or in this case, made a clearing in the woods, and they decided to plank boards from the trees they just cut down and throw up a main street with buildings on one side. You will see the actual people who built those buildings standing in front of them. This was at the junction of a rail line and the Mississippi River in Minnesota. But this is how all our cities started, it was some people with an idea, a supposition.

There were thousands of these all over America, and frankly all over the world, as people scratched out a version of life inside the human habitat that we call cities.



Figure 2: Photograph of Brainerd, Minnesota in 1905, in Daniel Herriges, *Neighborhoods Were Never Meant to be Unchanging*, STRONG TOWNS (June 23, 2022), <https://www.strongtowns.org/journal/2022/6/23/neighborhoods-were-never-meant-to-be-unchanging> [<https://perma.cc/MK9S-VLQD>].

This is what Brainerd, Minnesota looked like in 1905. A gradual thickening up of a community. This is a photo of the same street just a few years later. You will see that there are cross streets now. The road surface is a little bit better. You will notice that some of the buildings are a little bit taller. They are a little bit longer and a little bit deeper. The buildings have more ornate fronts. You will notice they are all still made of wood—wood that was most likely all milled and cut there onsite. The city was productive, it had economic value, provided opportunity for people who came there and because of that, the land value rose and buildings improved.



Figure 3: Photograph of Brainerd, Minnesota in 1930, in Daniel Herriges, *Neighborhoods Were Never Meant to be Unchanging*, STRONG TOWNS (June 23, 2022), <https://www.strongtowns.org/journal/2022/6/23/neighborhoods-were-never-meant-to-be-unchanging> [<https://perma.cc/MK9S-VLQD>].

Here is that same street in 1930. The economy has grown, more people were engaged in economic activity, and Brainerd became a successful place for people to be, work, and exist. You'll notice now instead of several cutout buildings, there are larger structures where the owners of the land underneath either came together or received outside investment and built larger buildings. These were almost all exclusively built out of brick and masonry.

You will notice now we have a paved street with a drain which means that water was going somewhere. So not only had they built these new structures, but following that, the community had gotten together and decided to provide some basic services like water removal, if not water treatment. Now normally during these conversations, people will come and say, "ah yeah it's fine. This is a town in the upper-Midwest. That's not really how it works. What about big cities?" We'll say, "Good thing you asked. We already did the homework."



Figure 4: Photograph of 47th Street and Broadway in New York City in 1878, in *Three Ways of Looking at Times Square*, EPHEMERAL N.Y. (Aug. 12, 2010), <https://ephemeralnewyork.wordpress.com/2010/08/12/three-ways-of-looking-at-times-square/> [https://perma.cc/Z92Q-DW5N].

Turning toward large cities, this is a photo of one of its most popular streets. I think you will notice what it is quite quickly. Like our other street, you can see a growing successful main street, this time in a large American town in 1878. Not much is over three stories. You can see that they might have some early streetlights, but the roads are still only partially developed. They have got some infrastructure, but it is still one-story and two-story structures that are mostly made of wood.



Figure 5: Photograph of Times Square in New York City in 1898, in Daniel Herriges, *Neighborhoods Were Never Meant to be Unchanging*, STRONG TOWNS (June 23, 2022), <https://www.strongtowns.org/journal/2022/6/23/neighborhoods-were-never-meant-to-be-unchanging> [<https://perma.cc/MK9S-VLQD>].

Next, you will notice, those of you who pay attention to sign ordinances, that they have yet to enforce one here much to, I am sure, the residents chagrin. But you will notice that these buildings have become a little larger and a little more ornate. Who knows what is going on behind those signs. We can see some larger three-story and four-story structures there in the back. You are going to start to notice what street I am talking about very soon.



Figure 6: Photograph of Times Square in New York City in 1911, in Renato Grussu, *Times Square Seen Through the History of its Hotels From the Early 1900's to Today*, VYN LA VOCE DI N.Y. (Aug. 30, 2021), <https://lavocedinewyork.com/en/lifestyles/2021/08/30/times-square-seen-through-the-history-of-its-hotels-from-the-early-1900s-to-today/> [<https://perma.cc/RD9F-RTK8>].

This is that same street in 1911. You will notice now that some of these buildings are so big they cannot fit in the picture anymore. We have a large, more intensely developed road. There is now a curb. We also now have a streetcar. There is electricity as well. The underlying land values have risen because of the successful economic outputs in this community to support this level of development.



Figure 7: Irving Underhill, *Longacre Square, S. from 46th St., New York City* (photograph), LIBRARY OF CONGRESS (1919), <https://www.loc.gov/pictures/item/2002709405/?ref=untappedcities.com> [<https://perma.cc/B949-BXSQ>].

This is a photo of that same street in 1919. Again, we can see another gradual thickening up of the area. Larger buildings with more impressive and ornate facades. Increased public transit options. This city is thriving, and you can see the success of the community here in its development.



Figure 8: Photograph of Times Square, in Charles Marohn, *Why Building in San Francisco, D.C. and NYC Will Never Solve Our Housing Problem*, STRONG TOWNS (Jan. 13, 2025), <https://www.strongtowns.org/journal/2025/1/13/why-building-in-san-francisco-dc-and-nyc-will-never-solve-our-housing-problem> [<https://perma.cc/BA5E-T2RX>].

Now, here is that same street today. This is how American cities were built regardless of size, because this is how human habitat was built since the beginning of human history. We have accumulated wisdom for millennia from our ancestors. There is not one right way to build cities that are healthy, vibrant, and as safe as they can be for everyone. No city is perfect. No one should come up here and say that they found the answer because they have not. But we do have an answer about the way that most cities look and the pattern of cities where people have a chance to be successful.

Our cities have a normal natural life cycle. We saw it in those pictures. Some people make a bet, they throw up some shacks, and they see what happens. There is a normal time-tested pattern of growth. Our cities have the exact same process and for some reason after World War II we thought we could skip steps, do it faster, build entire sections of our towns from a greenfield to fully completed state. And then we are continually surprised that our cities are anemic and unable to support the residents there.

Our cities are complex adaptive systems. Our cities are built after millennia of trial and error about what habitat for humans should look like. Much like a rainforest, stuff grows, stuff does not work, and trees fall. There are different ages and tiers of growth in a rainforest that all build on each other for an incredibly dynamic, complex system. Our cities are the same way. We can experience that in some very old American cities, but it is much easier to see it on the continent in Europe. Where, if there is a building code in any of those cities, I would struggle to see how they were going to be able to enforce a single one. And yet, those structures have stood for hundreds of years in many cases because this is a complex adaptive system. We do not build buildings for single uses in those complex adaptive systems. A building could be a home, it could be a business, it could be a bread-baking window.

Strong Towns's founder, Chuck, tells a story about his trip to Pompeii seeing the early Roman example of a fast-food window. There was a humble house that was in a block of houses at the edge of the city. They closed off the back door, turned the front door into a window, and put a hearth right in front. The family was baking bread in the front of their house and selling it out the window. The home was originally built with two rooms for a large extended family. And then, for whatever reason, they were able to acquire enough money to build the hearth in the front to start making bread and they did not have to ask for a single permit or sit in a board review for six years.

Our cities are complex adaptive systems, like the rainforest. If a fungus comes through and kills a lot of a specific kind of tree in the rainforest, the rainforest doesn't completely fall apart. Is it damaged? Absolutely. Does the stress placed on it produce outcomes we could not fathom? Yes. That is how we got to where we are now—because of complex adaptive systems.

Evolution puts strains and stressors on the rainforest and yet, the rainforest persists, much like cities built before 1950. Cities can have strains and stressors. They can change and morph. A warehouse can become a food hall, and a baseball training facility can become an office. However, this adaptability is impossible when the only thing you build is single-family tract homes. We have traded the eternal

wisdom of human experience in building human habitat for a car-dependent suburban pattern of development that is weak and ineffective.

Cities have traded complex systems for complicated systems.³ The juxtaposition here is a monoculture crop. Let's say it is Monsanto, which is not resilient. As soon as it has one external stressor, the entire ecosystem is decimated and there is no more corn because it is a complicated system.⁴ We have traded our complex systems for complicated systems. The houses you see in any city subdivision may have once felt like the "Great American Dream," but instead are the product of a system that is not resilient to change. Not only can the taxbase for these homes not support any of the infrastructure they are built on, but it is also illegal for one of these homes to become a hair salon. It is illegal for one of these homes to become a daycare center. By building to a complete and fixed state we have made it illegal and impractical for our cities to evolve. We have artificially engineered our cities to be unable to adapt, change, and meet the needs of its citizens. We have decided to do things this way.

Let's look at Brainerd, Minnesota again. Remember the images from the beginning of the presentation? Brainerd went through the normal thickening up process that all cities go through. As the series of small bets paid off, people made the next investment a little bit bigger, putting a little bit of their hard-earned money back into their community. And then, thanks to deliberate planning policies, and car-dependent infrastructure investments, this is what that same corner in Brainerd looks like today.



Figure 9: Photograph of Downtown Brainerd, 2010s, in Daniel Herriges, *But Where Will I Park?*, STRONG TOWNS (June 10, 2020), <https://www.strongtowns.org/journal/2020/6/9/but-where-will-i-park> [https://perma.cc/MT88-GRWR].

³ John Pattison, *Cities are Complex. So why do We Treat Them Like They're Merely Complicated?*, STRONG TOWNS (Oct. 2, 2020), <https://www.strongtowns.org/journal/2020/10/2/cities-are-complex-so-why-do-we-treat-them-like-theyre-merely-complicated> [https://perma.cc/EG3H-M8FJ].

⁴ *Eight Ways Monsanto Fails at Sustainable Agriculture*, CORNUCOPIA INST. (Oct. 29, 2014), <https://www.cornucopia.org/2012/02/eight-ways-monsanto-fails-at-sustainable-agriculture/#:~:text=%234:%20Expanding%20Monoculture,pesticide%20use%20and%20fertilizer%20pollution> [https://perma.cc/R3QR-PL44].

The natural life cycle of Brainerd as a city has been absolutely destroyed. In modern day Brainerd, there are service parking lots providing no taxable value to the community and no economic opportunity for the residents of that city. Vacant lots represent money being taken from that community and its descendants. Almost all these buildings were pushed over.

The systemic hollowing out of our cities is a choice that our communities have made. We have decided to do this. Unlike so many other crises we face now as a country, which we may not have had the power to prevent, this hollowing out crisis is a direct result of the choices we made. This means that we have the power here. Most of these laws, exclusionary single-family zoning, car-dependent suburban development, are all laws and regulations that we could change in one vote at city council.

These choices all have real costs. The choice to build in this development pattern has pipes, pumps, curbs and gutters, and they all add up. Here is an example of these costs highlighted by one of our partners at Urban3, a built environment data science firm out of Asheville, North Carolina led by Joe Minicozii. Much of the data that Strong Towns uses comes directly from their team.

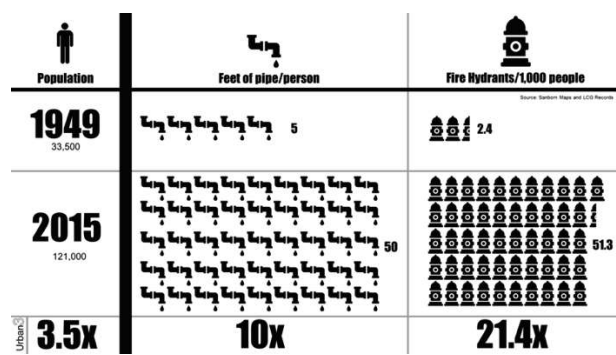


Table 1: Charles Marohn, *Lafayette Pipes and Hydrants* fig. 1, STRONG TOWNS (Sept. 14, 2015), <https://www.strongtowns.org/journal/2015/9/14/lafayette-pipes-and-hydrants> [https://perma.cc/K6P4-YCTQ].

This is from Lafayette, Louisiana, a town with a population of 33,000 people, in 1949.⁵ In 2015, the city’s population was 121,000, which is 3.5 times greater than the population in 1949.⁶ This increase is fairly standard for American population growth. While the population grew reasonably, the infrastructure to support that population exploded rapidly. The feet of pipe per person in the city went from five feet to fifty feet.⁷ The amount of fire hydrants per person increased from

⁵ Charles Marohn, *Lafayette Pipes and Hydrants* fig. 1, STRONG TOWNS (Sept. 14, 2015), <https://www.strongtowns.org/journal/2015/9/14/lafayette-pipes-and-hydrants> [https://perma.cc/K6P4-YCTQ].
⁶ *Id.*
⁷ *Id.*

2.4 fire hydrants per 1,000 people to 51.3 fire hydrants per 1,000 people.⁸ That is not only saddling that community with the installation cost of actual hard goods in the ground but the deferred maintenance, which can often exceed even the initial installation cost.⁹ The city is saddling their children and grandchildren with a debt burden that they will be unable to pay.



Figures 10 & 11: Old and Blighted (photograph), in Daniel Herriges, *But Rich People Live Here, So We Can't Be Broke*, STRONG TOWNS (Sept. 5, 2018), <https://www.strongtowns.org/journal/2018/9/5/but-rich-people-live-here-so-we-cant-be-going-broke> [<https://perma.cc/HU7F-EP2E>]; Shiny and New (photograph), in Daniel Herriges, *But Rich People Live Here, So We Can't Be Broke*, STRONG TOWNS (Sept. 5, 2018), <https://www.strongtowns.org/journal/2018/9/5/but-rich-people-live-here-so-we-cant-be-going-broke> [<https://perma.cc/HU7F-EP2E>].

Next, I am going to show you part of a city block in Brainerd, Minnesota. Figure 10 is our traditional pattern development.¹⁰ It is a lot of little stores. They are all stacked up on each other. There are places like this in almost every American city. Many have been blighted and torn down. Figure 10 is the normal old shops you see dotting the landscape and, you know, “urban-ish” centers. Figure 11 shows a Taco Johns.¹¹

But the block in Figure 10, which is traditional pattern of development in main streets all across America, has been bulldozed almost everywhere. And the reason is that it is blighted, it does not produce jobs, and no one cares about it. The block in Figure 11 sees growth that seems progress. They pushed all those buildings down and we got a Taco John's. We got a drive through, guys. We can drive through and get our mediocre tacos. This is seen as growth. This is maturation. This is going to provide jobs. This is what it looks like. We have all seen those places like Figure 10 get knocked over and turned into the places seen in Figure 11.

⁸ *Id.*

⁹ *What is Deferred Maintenance? [New Guide for 2024]*, OPENGOV, <https://opengov.com/deferred-maintenance/#risks> [<https://perma.cc/AGJ7-W9Q5>] (“Delaying maintenance can increase future costs for the same work, in some cases by as much as 600%.”).

¹⁰ See *supra* Figure 10.

¹¹ See *supra* Figure 11.

The taxable value per acre of the buildings in Figure 19 is \$1.1 million.¹² The taxable value per acre of the Taco John's in Figure 20 is \$618,000.¹³ We nearly halved the taxable value of this land for the city, essentially stealing wealth from that city's future generations for no reason. Taco John's does not employ local accountants to do their books. They don't have local staff to come in and help mow. This is happening in city after city in North America, and it is simply a choice.

III. A CITY'S WEALTH IS NOT WHERE YOU THINK

I am going to show more graphs we got from our team in Urban3 that are going to illustrate value-per-acre. I know it can be a little gnarly to get through, but we are going to talk about value-per-acre and I promise you are going to enjoy it. And if not, it was a free ticket to come so you cannot get a refund. You are going to see spikes here. These are not density spikes. They are taxable value-per-acre spikes. This is publicly available data that is showing the actual tax value of these places in the city.



Figure 12: Urban3, Presentation to the City of Buffalo, New York, Taxable Value Per Acre (2014).

Anything you see in red or purple is where the city makes money. Anything you see in green is where the city loses money by providing basic services to these places. If you go back, I think you can clearly tell which parts of the town are beneficial to the economics of the city and which parts of town are, frankly, on government welfare to subsidize their part of the city existing. And this was actually Buffalo, New York. And we are like, “oh my gosh, that is just because it is in the

¹² Old and Blighted (photograph), in Daniel Herriges, *But Rich People Live Here, So We Can't Be Broke*, STRONG TOWNS (Sept. 5, 2018), <https://www.strongtowns.org/journal/2018/9/5/but-rich-people-live-here-so-we-cant-be-going-broke> [https://perma.cc/HU7F-EP2E].

¹³ Shiny and New (photograph), in Daniel Herriges, *But Rich People Live Here, So We Can't Be Broke*, STRONG TOWNS (Sept. 5, 2018), <https://www.strongtowns.org/journal/2018/9/5/but-rich-people-live-here-so-we-cant-be-going-broke> [https://perma.cc/HU7F-EP2E].

Northeast and it is old and it is in rust belt.” “Nope. Here is mid-South.” Guess what? Exact same graph.

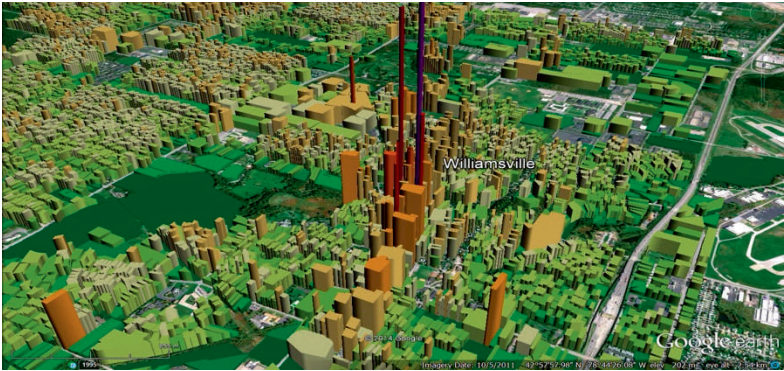


Figure 13: UB Reg'l Inst., *The Dollars Sense of Development Patterns*, BUFFALO NIAGRA REG'L REP. at 7 figs. 2 & 3, <https://regional-institute.buffalo.edu/wp-content/uploads/sites/155/2021/07/Dollars-and-Sense-Buffalo-Niagara.pdf> [<https://perma.cc/XDG2-35HR>].

The residents and tenants of the downtown properties are the ones paying taxes, whereas the suburbs are on welfare from the city. Those houses on giant lots in the suburbs are taking money away. They are being subsidized by the rest of town.

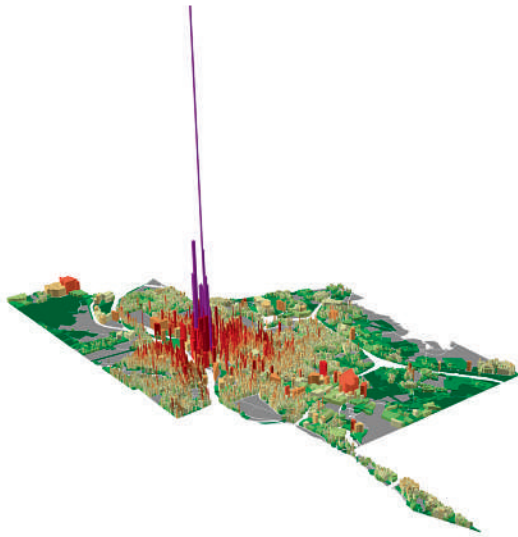


Figure 14: Urban3, Presentation to the City of Manchester, New Hampshire, Taxable Value Per Acre (2018).

Manchester, New Hampshire. Guess what guys? Same story all over again. Those peak spikes in the middle are the downtown area, the part that people say they feel unsafe in, the part that people are worried about their kids going to after dark, that is where the entire economic activity of all of the city is located.

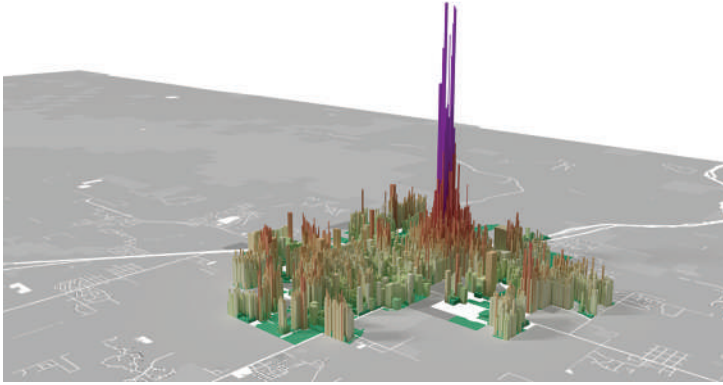


Figure 15: City of Bozeman, *Urban3: Dollars and Sense of Land Use for Bozeman/Gallatin County*, YOUTUBE (July 13, 2018), https://www.youtube.com/watch?v=D_O_XamHuo4 [<https://perma.cc/2UBL-TKZA>] (citing the slide at 40:14).

Guess what guys? Even a frontier town in the high-West, Bozeman, Montana, looks exactly the same. The suburbs are stealing money from the city in goods and services, and we just decided to let them.

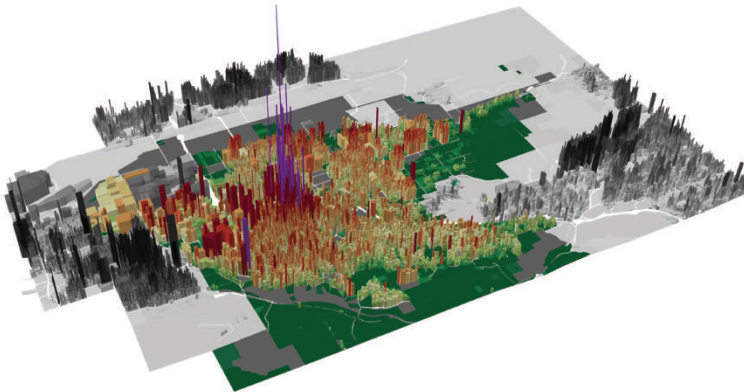


Figure 16: Rachel Quednau, *Why Walkable Streets are More Economically Productive* fig. 5, STRONG TOWNS (Jan. 18, 2018), <https://www.strongtowns.org/journal/2018/1/16/why-walkable-streets-are-more-economically-productive> [<https://perma.cc/6UZV-4SLP>].

Redlands, California a high-West new city. Shockingly, this town has the exact same results.

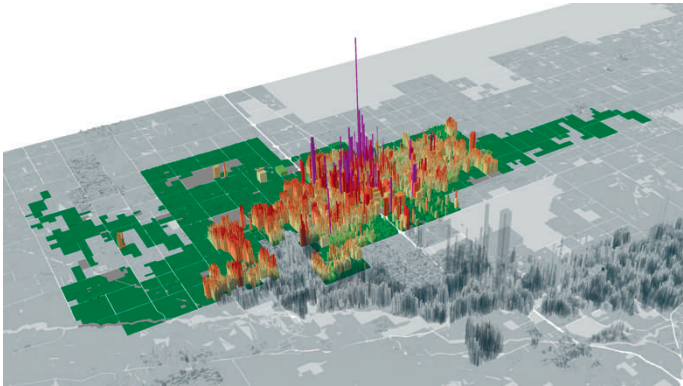


Figure 17: Urban3, Presentation to the City of Lancaster, California, Taxable Value Per Acre (2014).

Lancaster, California, pictured above, has even more of this subsidizing occurring.

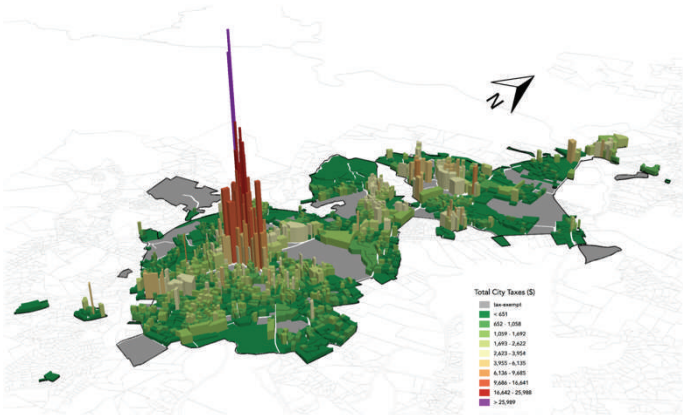


Figure 18: Urban3, Presentation to the City of Brevard, North Carolina, Taxable Value Per Acre (2016).

Here is Brevard, North Carolina another growing city in the mid-South. This image shows the same trend.

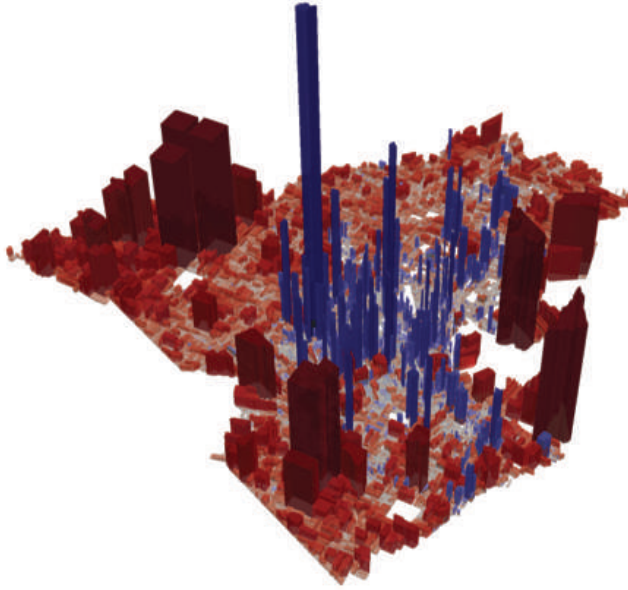
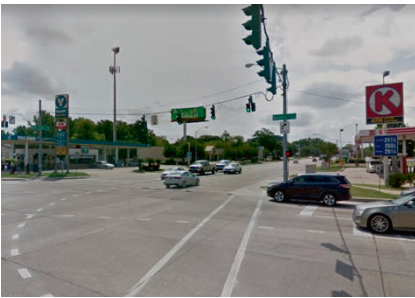


Figure 19: Lafayette, Louisiana, in N.D. Dep't of Commerce, *2021 Main Street Summit Keynote: Strong Towns with Charles Marohn*, YOUTUBE (Oct. 15, 2021), <https://www.youtube.com/watch?v=tm2duuL4KSY> [<https://perma.cc/D48X-JSSA>] (citing the slide at 9:26).



Figures 20 & 21: Photograph of a strip mall, in Charles Marohn, *Your City's Wealth Isn't Where You Think*, STRONG TOWNS (Nov. 17, 2020), <https://www.strongtowns.org/journal/2020/11/11/poor-neighborhoods-make-the-best-investments-md2020> [<https://perma.cc/7PJY-ZWMR>]; Photograph of a suburban neighborhood, in Charles Marohn, *Your City's Wealth Isn't Where You Think*, STRONG TOWNS (Nov. 17, 2020), <https://www.strongtowns.org/journal/2020/11/11/poor-neighborhoods-make-the-best-investments-md2020> [<https://perma.cc/7PJY-ZWMR>].



Figures 22 & 23: Photograph of downtown business district in Lafayette, Louisiana, in Charles Marohn, *Your City's Wealth Isn't Where You Think*, STRONG TOWNS (Nov. 17, 2020), <https://www.strongtowns.org/journal/2020/11/11/poor-neighborhoods-make-the-best-investments-md2020> [<https://perma.cc/7PJY-ZWMR>]; Photograph of a downtown residential neighborhood in Lafayette, Louisiana, in Charles Marohn, *Your City's Wealth Isn't Where You Think*, STRONG TOWNS (Nov. 17, 2020), <https://www.strongtowns.org/journal/2020/11/11/poor-neighborhoods-make-the-best-investments-md2020> [<https://perma.cc/7PJY-ZWMR>].

This is one of the starkest examples of the outcomes of the suburban experiment. In Figures 20 and 21, you have a development pattern that feels like success, right?¹⁴ We have got strip malls and big houses that lots of people feel really good about having. In Figures 22 and 23, we have the part of town that people do not like. The part of town people want to condemn and push over. These blue spikes from Figure 19 are all the places like those in Figures 22 and 23. The red spikes in Figure 19's data set,¹⁵ which represents what is costing the city a lot of money, is for all the places like those in Figures 20 and 21. We have tricked ourselves into believing this leach on our cities and on our communities is actually growth and health. So, when you find that pothole, when you see that rundown section of street, when you are wondering why the up time on water, sewer, electricity, trash pickup, school district bus maintenance or bus times are struggling, think of these photos and know that unsustainable suburban sprawl is to blame. That is why your cities are going broke.

IV. SOLUTIONS: STRONG TOWNS FIVE CORE CAMPAIGNS

In Strong Towns, we have five core campaigns, and we believe that these campaigns can help cities reverse the damage of suburban sprawl that has been done. The first thing cities can and should do is increase incremental housing, meaning allow basically anything by any right. And I know how scary and insane that sounds. I promise I do. But the only way we are going to reverse this trend is by building

¹⁴ See *supra* Figures 20 & 21.

¹⁵ See *supra* Figure 19.

sustainable housing. Housing that is built in the suburban post-war development pattern at the edge of a city is not sustainable. You are cursing those communities and the people there into a downward cycle of wealth theft in addition to leaching your cities dry with that growth. I know that is harsh. It is true.

Do we need more housing? Absolutely. Should we let housing be built? Absolutely. Should we prefer housing that is incremental infill development on infrastructure that we have already paid for? Ten times out of ten, yes. And again, incremental infill development is going to be done by the people who are already living in your community. The reason that suburban developments on the edge of town are oftentimes the only kind of developments that can work in a city is because they can be built by an external developer that has five lawyers on in-house counsel who have dealt with all the eccentricities and laws that all our cities have piled on to development. Fix that. That is the first thing we need to do.

The next thing we need to do is focus on building safe and productive streets. We must stop prioritizing automotive throughput. We have to prioritize the safety of all people using our streets as opposed to optimizing our road design for letting cars go as fast as possible. We do not have to talk about plane crash versus car crash numbers anymore. This is another choice we are making. We have intentionally made our roads as wide as possible so people can drive as fast as possible, so that the engineering organizations across North America, who guess what, shockingly, have an incentive to get more roads built.

Just a side rant on that, if you ever see numbers about how highway expansion or road expansion is going to increase economic productivity, it is the biggest lie ever. What they do is they will say, "okay, this road is going to save each person thirty seconds on their commute. One hundred million people go through it. So that is 300 million minutes. That many minutes is this many hours, and that many hours at the prevailing wage rate in our community is this." Then, increased demand comes along, and it is the exact same travel time. Highway expansion is theft.

Next, our cities must end parking mandates and subsidies. My favorite bar in my hometown of Fayetteville, Arkansas, is in a building that sat empty for forty years because you could not find parking by the building. It had six spots out front. It is now the hardest restaurant reservation to get in our town. And they have opened three more restaurants employing dozens of people because we simply repealed our parking mandates. We changed literally nothing else in the business or tax code.

So, what do we need to do? We need to maintain a low bar of entry. Let people try things. Let people open a hair braiding studio in their garage. Let them take that abandoned warehouse front downtown and turn it into something. Let people build starter homes or as they used to be called, homes. In most of our cities, you cannot build homes under 1,200 square feet. For the entirety of human history that was just a house. That is the house we all lived and grew up in. That is the house every one of our parents and grandparents was born and raised in. When you needed an extra room, you added it. You did not have to start off with seven bedrooms and a four-car garage. And you could do it on tiny, tiny lots.

Allow businesses to start with the shipping businesses. We have worked with several communities to get shacks from Home Depot and put them in an abandoned parking lot and create an expedited business license process so that people can try something new. The people that grow out of those incubators will

occupy the vacant space in your community. They will take those empty storefronts that are not producing any tax income or jobs, and they will turn them into productive businesses.

Respond to how people actually use the city. These are called desire paths, and you need to recognize desire paths. These are really easy to see and why we use them as an example, but there are probably desire paths in the business license office in your city, too. These business desire paths exist where people are trying to do the best they can and the process itself is stopping them. Again, it is functioning the exact way that it was meant to by making it hard for people that we did not like at some point to get something done. So, find those desire paths in your community and fix them as quickly as you can.

Here at Strong Towns, we believe that there is a pretty straightforward path in trying this, much like our ancestors did. Observe where people in the community struggle. What is the thing that you can do? Is it really hard to get a business permit? Is it really hard to get a building permit? Simplify that process. Give people a chance to try something new.

Then, once we find out what the next smallest thing is, do that thing right away. Just do it. This is where we actually have control. And this is one of the things that I think is so important in the kinds of conversations we are going to be finding ourselves in for the next however many years. We have to take control where we can take control. And this can be at the municipal level, at the county level, or anywhere within your local jurisdiction. Find what you can do next and do it. Do what you can do in your community.

So again, our cities do not need to go from incubation all the way to finished state. They need to be allowed to change and grow. We can do this. We have the control. This is why we believe that local government is actually the highest form of government that can be active because we can make these changes. Every single thing I talked about today is a thing that citizens in Kansas, Missouri, Arkansas, or any other state, could go to city council and change. These are all things that we have the power to change.

Next, no one is coming to save you. No one is going to come save your community. The only people who can do that are you. But what a wonderful, amazing opportunity because we can do this. We have seen a change in community after community where there were enough people who cared enough to get something done.

If you want more from Strong Towns, we have books, and you can go check out strongtowns.org. What I find most encouraging about this work is that, while policy change can often take years—and that work is important and necessary—some of the most impactful changes can happen right away. We can change parking mandates in our cities tomorrow. We can reform exclusionary single-family zoning in our communities tomorrow. And I know this is possible because it is already happening. We have done it before. Thank you all so much.

TOWARDS UNIVERSAL ACCESS: EXPLORING THE ROLE AND FEASIBILITY OF FARE-FREE TRANSIT IN THE UNITED STATES

By: Joel Mendez & Ian D. Njuguna*

I. INTRODUCTION

Low-income and minority households within the United States are less likely to own an automobile and more likely to suffer from limited mobility.¹ These households adapt to limited mobility by taking fewer trips and traveling shorter distances.² This change in travel behavior can limit the access that this population has to healthcare services, welfare services, recreational facilities, jobs, grocery stores, educational and training opportunities, and social networks.³ An individual's quality of life is shaped by their connection to such resources and opportunities. Limited access to these essential destinations has been found to hinder employment participation, health outcomes, and social participation while contributing to long term cycles of poverty in low-income and minority communities.⁴ It can also contribute to the social exclusion of residents, which refers to the inability to

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¹ GENEVIEVE GIULIANO, HSI-HWA HU & KYOUNG LEE, THE ROLE OF PUBLIC TRANSIT IN THE MOBILITY OF LOW INCOME HOUSEHOLDS 1, 7–9 (2001); THOMAS W. SANCHEZ, RICH STOLZ & JACINTA S. MA, MOVING TO EQUITY: ADDRESSING INEQUITABLE EFFECTS OF TRANSPORTATION POLICIES ON MINORITIES I (The Civ. Rts. Project at Harvard Univ. 2003); Karen Lucas, *Transport and Social Exclusion: Where Are We Now?*, 20 TRANSP. POL'Y 105, 106–07 (2012); Timothy F. Welch, *Equity in Transport: The Distribution of Transit Access and Connectivity Among Affordable Housing Units*, 30 TRANSP. POL'Y 283, 284 (2013); Evelyn Blumenberg & Asha Weinstein Agrawal, *Getting Around When You're Just Getting By: Transportation Survival Strategies of the Poor*, 18 J. POVERTY 355, 358 (2014).

² GIULIANO ET AL., *supra* note 1, at 1, 7; SANCHEZ ET AL., *supra* note 1, at 14; Blumenberg & Agrawal, *supra* note 1, at 358.

³ Susan Kenyon, Glenn Lyons & Jackie Rafferty, *Transport and Social Exclusion: Investigating the Possibility of Promoting Inclusion Through Virtual Mobility*, 10 J. TRANSP. GEOGRAPHY 207, 212 (2002); Lucas, *supra* note 1, at 106–07; Roger L. Mackett & Roselle Thoreau, *Transport, Social Exclusion and Health*, 2 J. TRANSP. & HEALTH 610, 610–13 (2015); Amy Lubitow, Jennifer Rainer & Sasha Bassett, *Exclusion and Vulnerability on Public Transit: Experiences of Transit Dependent Riders in Portland, Oregon*, 12 MOBILITIES 924, 926, 933 (2017); Sicheng Wang, Xuanke Wu & Yuche Chen, *Association Between Perceived Transportation Disadvantages and Opportunity Inaccessibility: A Social Equity Study*, 101 TRANSP. RSCH. PART D: TRANSP. & ENV'T 1, 1–2 (2021); Blumenberg & Agrawal, *supra* note 1, at 356, 369.

⁴ Welch, *supra* note 1, at 283; FENG ZHAO & THOMAS GUSTAFSON, TRANSPORTATION NEEDS OF DISADVANTAGED POPULATIONS: WHERE, WHEN, AND HOW? 17 (Fed. Transit Admin. 2013).

participate in normal processes of society, whether in economic, social, cultural, or political arenas.⁵

Transit can play a vital role in combating such outcomes as it can enhance personal mobility and access to social and public amenities and facilities. This impact is heightened when focusing on racial minorities and low-income residents as they are disproportionately reliant on public transit⁶ and compose the majority share of users.⁷ The impact which transit can have on enhancing mobility, access, and addressing social exclusion can be hindered due to barriers which discourage its use. For many low-income and minority residents, fare affordability is a major barrier.⁸ One way to address this barrier, which has gotten a lot of recent attention in major U.S. cities, is via the implementation of a zero-fare transit policy.

Fare-free transit policies involve the delivery of public transportation services without requiring passengers to pay a fare. These policies exist on a spectrum, ranging from partial to full implementation.⁹ A full fare-free policy eliminates fares systemwide for all users. In contrast, partial fare-free policies remove fares only under specific circumstances. This can include eliminating fares during certain times, on specific routes, or for specific user groups. In the United States, partial fare-free policies are relatively common, while full fare-free policies are rare, although this is beginning to change.

The implementation of a fare-free transit policy may sound like a drastic change, but it is more feasible than many think. When transit fares don't generate much revenue compared to what it costs to run the system, eliminating fares can be a sensible business decision. In such instances, the cost of the fare collection process itself is close to, or exceeds, the amount collected from passengers.¹⁰ This happens to be the case widely throughout the United States as transit service providers commonly cover a very small portion of their operating costs via fare revenue.¹¹ Considering this financial reality, and the increasing inequalities in many communities due to limited access to resources, should fare-free transit policies be more widely adopted? This Note plays a part in this conversation by exploring the ability of fare-free transit to address issues associated with limited mobility and access. The feasibility of implementing fare-free transit policies in the United States

⁵ Juan Pablo Bocarejo S. & Daniel Ricardo Oviedo H., *Transport Accessibility and Social Inequities: A Tool for Identification of Mobility Needs and Evaluation of Transport Investments*, 24 J. TRANSP. GEOGRAPHY 142, 144 (2012); Lucas, *supra* note 1, at 106.

⁶ SANCHEZ ET AL., *supra* note 1, at 13; E. Eric Boschmann & Mei-Po Kwan, *Toward Socially Sustainable Urban Transportation: Progress and Potentials*, 2 INT'L J. SUSTAINABLE TRANSP. 138, 147 (2008).

⁷ HUGH M. CLARK, WHO RIDES PUBLIC TRANSPORTATION 4 (2017).

⁸ Lubitow et al., *supra* note 3, at 929–30; Zhenyuan “Eric” Ma, Abdul Rahman Masoud & Ahmed O. Idris, *Modeling the Impact of Transit Fare Change on Passengers’ Accessibility*, 2652 TRANSP. RSCH. REC.: J. TRANSP. RSCH. BD., 78, 78 (2017); Diego Da Silva, Willem Klumpenhout, Alex Karner, Mitchell Robinson, Rick Liu & Amer Shalaby, *Living on a Fare: Modeling and Quantifying the Effects of Fare Budgets on Transit Access and Equity*, 101 J. TRANSP. GEOGRAPHY 1–2 (2022).

⁹ Wojciech Kęblowski, *Why (Not) Abolish Fares? Exploring the Global Geography of Fare-Free Public Transit*, 47 TRANSP. 2807, 2810 (2019).

¹⁰ JOEL VOLINSKI, NAT'L ACADS. OF SCI., ENG'G, & MED., IMPLEMENTATION AND OUTCOMES OF FARE-FREE TRANSIT SYSTEMS 2 (Nat'l Acads. Press 2012).

¹¹ FED. TRANSIT ADMIN., SINGLE SUMMARY OF TRANSIT REP. 2022 EDITION 146 (2022).

is also examined, with a focus on how current laws and policies may either support or hinder such efforts.

In Part II, we provide an overview of the delivery of transit service in the United States, focusing on how the purpose of transit shifted as it transitioned from private to public ownership. In Part III, we detail how transit is currently being funded and highlight the role which transit fares play in this process. In Part IV, we detail the shift towards suburbanization in this country and the inequalities which arose as a result of this shift in resources and opportunities. We present the enhancement of mobility as a way in which to address observed inequalities. In Part V, we present how fare-free transit can enhance mobility throughout a region while also granting greater access to essential services. We highlight cases which have implemented a fare-free transit policy and detail observed outcomes. Lastly, in Part VI, we examine the extent to which federal and state laws and policies influence the implementation of fare-free transit policies. We also suggest necessary actions if we want to support the broad implementation of such policies.

II. THE EVOLUTION OF PUBLIC TRANSIT OWNERSHIP IN THE UNITED STATES

Historically, the private sector played a dominant role in the provision of urban mass transit in the United States. Private firms developed and operated extensive networks of streetcars, buses, and rail services, shaping the movement of people within urban areas. This private-sector dominance, however, was not without its challenges. Regulatory constraints, economic pressures, and demographic shifts all contributed to the decline of private transit operations, ultimately necessitating a transition to public ownership. This shift profoundly altered the goals, focus, and priorities of transit service in the U.S.

A. Challenges of Private Sector Dominance in Transit

While the private transit industry flourished during the late nineteenth and early twentieth centuries, several inherent weaknesses contributed to its decline. Dominant among these issues was overexpansion.¹² Many firms overbuilt their networks due to optimistic ridership projections, attempts to profit from resulting land development, securing territory from competitors, and a lack of integrated planning.¹³ This led to a situation where profitable lines in densely populated areas were tasked with subsidizing underperforming routes in sparsely settled areas.¹⁴ Over time, maintaining these financially unviable routes placed a growing strain on private operators.

¹² Stanley Mallach, *The Origins of the Decline of Urban Mass Transportation in the United States, 1890-1930*, 8 URBANISM PAST & PRESENT 1, 1 (1979).

¹³ *Id.*

¹⁴ *Id.*

Regulatory constraints imposed by municipal franchise agreements, which were contracts granting private companies the right to build and operate transit services within specific geographic areas or along designated routes, limited the ability of transit companies to respond to growing financial pressure.¹⁵ The standard five-cent fare, a common regulatory provision within franchise agreements, ensured affordability but prevented companies from adjusting prices in response to rising operating costs.¹⁶ Public opposition to fare increases compounded these difficulties, as even modest adjustments were met with resistance from riders and city governments alike.¹⁷

The rise of the automobile and suburbanization in the mid-twentieth century further eroded the financial viability of private transit companies.¹⁸ As Americans increasingly moved to suburban areas, dispersed settlement patterns made it difficult for private operators to serve new, low-density communities profitably.¹⁹ The construction of federally funded highways accelerated suburbanization, leading to declining ridership and revenue shortfalls for transit firms.²⁰ By the postwar era, the private transit model was no longer sustainable, with many companies facing insolvency and service cutbacks.

B. The Transition to Public Ownership and the Implications on Transit Priorities

The financial struggles of private transit operators in the postwar period led to the widespread municipalization of transit services.²¹ Facing service cutbacks and the collapse of private providers, cities and states stepped in to ensure the continued operation of transit networks. Major urban centers such as Boston, Chicago, Cleveland, and New York were among the first to take control of struggling rail and bus systems.²² This trend accelerated with the passage of the Urban Mass Transportation Act of 1964, which provided federal funding for cities to acquire and improve transit infrastructure.²³ By the 1980s, public ownership had become the dominant model, with over 500 publicly owned transit agencies operating across the country.²⁴

The transition to public ownership brought a fundamental shift in the mission of transit agencies. Under private ownership, transit companies focused primarily on maximizing revenue and controlling costs to ensure profitability. Publicly owned transit agencies, however, operated under a broader mandate,

¹⁵ See *id.* at 3; George M. Smerk, *Urban Mass Transportation: From Private to Public to Privatization*, 26 TRANSP. J. 83, 83–85 (1986).

¹⁶ Mallach, *supra* note 12, at 2.

¹⁷ *Id.* at 5.

¹⁸ *Id.* at 13.

¹⁹ Smerk, *supra* note 15, at 85.

²⁰ TRANSP. RSCH. BD.: NAT'L RSCH. COUNCIL, CONTRACTING FOR BUS AND DEMAND-RESPONSIVE TRANSIT SERVICES: A SURVEY OF U.S. PRACTICE AND EXPERIENCE: SPECIAL REPORT 258, at 33 (Nat'l Acads. Press 2001).

²¹ *Id.* at 41.

²² *Id.* at 34.

²³ *Id.*

²⁴ *Id.* at 35.

emphasizing service provision as a public good rather than a purely commercial enterprise.²⁵

This shift in priorities allowed transit agencies to pursue goals beyond fare maximization, such as a) social equity, by prioritizing service access for low-income and disadvantaged populations and ensuring mobility for those without private vehicles; b) traffic and environmental concerns, by leveraging transit investments to address congestion and improve air quality; c) economic development, by using transit investment as a catalyst for economic revitalization while supporting business districts and job accessibility; and d) quality of life, by using transit investment to shape land use policies and enhance urban aesthetics.²⁶

While public ownership resolved many of the financial and operational challenges faced by private firms, it also introduced new issues, such as being vulnerable to political shifts and balancing competing priorities, such as cost recovery with social service obligations.²⁷ Ultimately, the shift from private to public ownership reshaped the landscape of urban transit in the United States. The public sector now plays a central role in ensuring mobility and accessibility in American cities. This fundamental shift towards public ownership required a significant change in how transit services are financed. Consequently, the following Part examines the diverse funding mechanisms currently supporting public transit agencies.

III. FUNDING TRANSIT

Public transportation is largely funded by passenger fares and financial assistance from state, local, and federal governments.²⁸ Funding is utilized to cover expenses incurred by transit service providers which typically fall within one of two categories. Capital costs include expenditures for infrastructure development, vehicle procurement, and system expansion while operating costs encompass day-to-day expenses such as fuel purchases, employee wages, and vehicle maintenance.²⁹ In 2019, spending on public transportation totaled seventy-nine billion dollars, with fifty-four billion dollars being dedicated to cover operating costs and twenty-four billion dollars for capital expenditures.³⁰

²⁵ Brian D. Taylor & Eric A. Morris, *Public Transportation Objectives and Rider Demographics: Are Transit's Priorities Poor Public Policy?*, 42 TRANSP. 347, 348 (2015).

²⁶ *Id.*

²⁷ TRANSP. RSCH. BD., *supra* note 20, at 37.

²⁸ 2023 *Public Transportation Fact Book*, APTA (Mar. 2024), <https://www.apta.com/wp-content/uploads/APTA-2023-Public-Transportation-Fact-Book.pdf> [<https://perma.cc/MT4X-6738>].

²⁹ JOEL MENDEZ, JAMES WOOD, DRISTI NEOG & JEFFREY R. BROWN, HANDBOOK OF PUBLIC TRANSPORT RESEARCH: PAYING FOR PUBLIC TRANSPORT 202, 203 (2021).

³⁰ CONG. BUDGET OFF., FEDERAL FINANCIAL SUPPORT FOR PUBLIC TRANSPORTATION 2 (2022).

A. The Role of Transit Fares

Passenger fares are a fundamental component of transit funding, serving as a direct charge for service consumed by riders. Most transit agencies require passengers to pay a fare, though the structure of these fares can vary. The form that fares can take varies as it can be a set amount regardless of trip characteristics; distance or zone-based, which increases based on the distance traveled; and incorporate dynamic components that adjust fares based on time of day, often implementing higher rates during windows of peak demand.³¹ The primary advantage of fare-based revenue is its alignment with user-pays principles, which support efficiency and equity by charging those who directly use transit service.³² While transit fares are essential for generating revenue, they are insufficient as a standalone funding source. In fact, they rarely cover operating costs alone.³³ The farebox recovery ratio attained by transit service providers, which represents the percentage of operational costs recouped through passenger fares, details the extent of this funding deficit. The average farebox recovery ratio for transit service providers sits at roughly thirty-three percent.³⁴ This leads to the requirement of supplementary funding to sustain public transit operations and ensure continued service availability.

B. Federal Funding and Support

Federal involvement in public transit has evolved significantly since the passage of the Urban Mass Transportation Act of 1964. Before the mid-1960s, public funding for transit systems was minimal, and federal assistance was primarily directed toward recapitalizing these systems.³⁵ Over time, the focus of federal funding has expanded beyond mere capital investment to support operational expenses, safety oversight, planning, and research.³⁶

At the heart of federal funding for public transportation is the public transportation program administered by the Department of Transportation's Federal Transit Administration (FTA). Since 1964, the FTA has partnered with state and local governments, channeling over twenty billion dollars annually into public transit.³⁷ Almost all federal support for public transportation is provided through FTA grants, which are typically awarded to individual transit agencies.³⁸ These grants are predominantly distributed through formula-based mechanisms set by Congress. The formulas consider factors such as population size and density, the extent of local transit infrastructure, and overall demand for public transportation.³⁹

³¹ MENDEZ ET AL., *supra* note 29, at 206.

³² *Id.*

³³ *Id.* at 205.

³⁴ *Id.* at 212.

³⁵ WILLIAM J. MALLET, CONG. RSCH. SERV., R47002, FED. PUB. TRANSP. PROGRAM: IN BRIEF, at 1 (2024).

³⁶ *Id.*

³⁷ *Grant Programs*, FED. TRANSIT ADMIN., <https://www.transit.dot.gov/funding/grants/grant-programs> [<https://perma.cc/VF3A-BFS4>].

³⁸ Nathan Musick, *Fed. Financial Support for Pub. Transp.*, CONG. BUDGET OFF., <https://www.cbo.gov/publication/57940> [<https://perma.cc/C5Y3-BRLA>].

³⁹ *Id.*

In addition to formula grants, some funding is allocated through a competitive selection, with grants awarded to projects that address specific program objectives.⁴⁰ Competitive grant programs enable a broad range of eligible applicants, such as state and local governments, federally recognized Tribes, transit providers, research institutions, and non-profit organizations, to apply for funding.⁴¹ In some FTA programs, formula and competitive approaches are integrated to ensure equitable distribution among transit agencies of varying sizes and geographic contexts, including urban and rural areas.⁴²

The FTA draws its funds from two primary sources: the mass transit account of the Highway Trust Fund (HTF) and the general fund of the Treasury.⁴³ First, the FTA receives funds from the mass transit account of the HTF, a federal fund composed of two separate accounts, one for highways and one for mass transit. Revenue for the HTF is generated primarily through excise taxes on motor fuel, trucks, trailers, and truck tires, as well as other related taxes and interest credited to the fund.⁴⁴ About eighty percent of HTF revenues typically support highway programs, while twenty percent is allocated to mass transit.⁴⁵ Of the funds allocated to mass transit, roughly two-thirds support capital spending, and the remainder is used for operations and maintenance.⁴⁶

Transfers from the general fund of the Treasury serve as an additional funding source essential to sustaining public transit due to the continued revenue shortfalls experienced by the HTF for over a decade.⁴⁷ The HTF's receipts have not kept pace with the growing demands of highway and mass transit programs. Congress has enacted laws since 2008 that have transferred more than \$268 billion from the Treasury's general fund to the HTF to address this gap.⁴⁸ These transfers help ensure public transportation systems' continued operation and expansion despite insufficient dedicated revenues. Federal public transportation resources are further bolstered by surface transportation programs that permit highway funds to support transit projects and additional funding from non-transportation programs that support areas such as health, education, and veterans affairs.⁴⁹

C. Local Funding and Support

A significant amount of public transit funding is generated locally, within the specific communities or regions where the service operates. In 2022, state and

⁴⁰ *Overview of Funding and Financing at USDOT*, U.S. DEP'T OF TRANSP. (March 20, 2025), <https://www.transportation.gov/grants/dot-navigator/overview-funding-and-financing-usdot> [<https://perma.cc/UXG2-NWJ8>].

⁴¹ *Id.*

⁴² Musick, *supra* note 38.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ MALLEY, *supra* note 35, at 3.

local sources together accounted for over forty percent of all transit funding (both operating and capital expenses).⁵⁰ The most common types of local funding include sales taxes, payroll taxes, fees charged to motorists, and others, as detailed below.⁵¹

Sales Tax: Sales taxes are the most common funding source for local and regional transit services. The tax is typically set as a percentage of the purchase price of goods being sold and resulting tax revenues are collected from merchants. Sales taxes are typically approved through a public vote and are often tied to specific projects that are to be funded by tax revenues.

Payroll Tax: Payroll taxes are levied on an employer's gross payroll. This mechanism shares the cost of transit with entities that benefit from its existence. Since transit systems help employees commute efficiently, reduce traffic congestion, and support economic activity, businesses benefit from reliable transportation infrastructure. Some regions impose payroll taxes on employers because they recognize that a well-functioning transit system enhances workforce mobility, reduces the need for large parking facilities, and contributes to a more accessible labor market.⁵²

Property Taxes: Property taxes, which are based on the value of land and buildings, serve as a key revenue source for many local governments. They provide a stable, locally controlled revenue stream. In some areas, a portion of these revenues is allocated to support public transit, recognizing the role transit plays in enhancing accessibility and boosting property values.

Taxes and Fees Imposed on Motorists: Motorists contribute to public transit funding through various taxes and fees, such as parking charges, tolls, and vehicle lease/rental fees. Additionally, vehicle registration fees are the second most common source of state-level transportation revenue, with over half of states using them to raise more than twenty-five percent of their dedicated transportation funds.

Tax Increment Financing Districts: Tax Increment Financing (TIF) districts leverage expected property value increases to fund public improvements like transit. When a transit project is built within a TIF district using initial financing like bonds, it is anticipated to raise property values and, thus, property tax revenues over time. TIF captures this additional tax revenue that surpasses the original baseline level. These captured funds are then dedicated solely to paying back the initial cost of the transit project.

IV. SUBURBANIZATION AND THE IMPACT ON ACCESS

While the nature of public transit evolved in the United States, so did the communities where people settled. An outward wave of activity infused the urban periphery with a growing populace and extensive economic activity. While crafting the suburbs we see today, this shift contributed to the development of significant regional inequalities, negatively impacting the well-being and quality of life for many. Enhancing one's mobility is often seen as a crucial way to address these adverse outcomes.

⁵⁰ FED. TRANSIT ADMIN., *supra* note 11, at 111.

⁵¹ MENDEZ ET AL., *supra* note 29, at 209; *A Guide to Transportation Funding Options*, TEX. TRANSP. INST.: UNIV. TRANSP. CTR. FOR MOBILITY, <https://utcm.tti.tamu.edu/tfo/transit/summary.stm> [<https://perma.cc/5AYR-VY8B>].

⁵² MENDEZ ET AL., *supra* note 29, at 209–10.

A. Suburbanization and White Flight

The suburbanization of America, which was implemented aggressively, can be traced back to the National Housing Act of 1934, facilitated through the Federal Housing Administration (FHA).⁵³ Prior to the Act, the Homeowners' Loan Corporation (HOLC) was established in 1933 to secure mortgages, thereby mitigating the risk of foreclosure.⁵⁴ However, this program was not just in its implementation. As part of the appraisal method and risk assessment used by HOLC, banks were required to evaluate potential beneficiaries based on their income, occupation, location, and ethnicity.⁵⁵ The outcome of this appraisal method was the creation of secret "redlining" maps, which were used to identify lending risks ranging from hazardous to best.⁵⁶ Neighborhoods with African American residents, older housing, and lower-income households were consistently assigned a D rating, labeled as "hazardous," and marked in red.⁵⁷ This process effectively closed off access to mortgages from the minority communities for decades.

The areas deemed most desirable were situated outside inner cities and adhered to FHA underwriting standards, which promoted the single-family, dispersed, automobile-centric model as the preferred approach for new construction.⁵⁸ This incentivized white flight, where the inner-city population, particularly the high-income white majority, moved from the city to the suburbs, where this new housing pattern was being established, giving rise to the concept of the American dream.⁵⁹

In response to this flight, business and industrial facilities relocated to the suburbs, following their customer base and labor sources.⁶⁰ Moreover, the industrial revolution was ongoing at the time, transforming the manufacturing process from labor-intensive to machine-intensive. These new processes, such as the assembly line, required larger and ideally single-level facilities, which necessitated more land

⁵³ KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 191–218 (1985); CAROL LAMBERG, HOUSING SECURITY: A SECTION 8 MEMOIR (2021).

⁵⁴ JACKSON, *supra* note 53, at 195–96.

⁵⁵ See Amy E. Hillier, *Redlining and the Homeowners' Loan Corporation*, 29 J. URB. HIST. 394, 395, 398, 402, 405 (2003).

⁵⁶ *Id.* at 395, 401; Gregory D. Squires, *Racial Profiling, Insurance Style: Insurance Redlining and the Uneven Development of Metropolitan Areas*, 25 J. URB. AFFAIRS 391, 394–407 (2003).

⁵⁷ Hillier, *supra* note 55, at 395.

⁵⁸ See Michael Southworth & Eran Ben-Joseph, *Street Standards and the Shaping of Suburbia*, 61 J. AM. PLAN. ASS. 65, 74–75 (1995).

⁵⁹ See Keith Ihlanfeldt, *The Spatial Mismatch Between Jobs and Residential Locations Within Urban Areas*, 1 CITYSCAPE 219, 228 (1994); see VINIT MUKHIJA, REMAKING THE AMERICAN DREAM 37–40 (2022).

⁶⁰ See Yingling Fan, *The Planners' War Against Spatial Mismatch: Lessons Learned and Ways Forward*, 27 J. PLAN. LIT. 153 (2012); WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR, 111 POL. SCI. Q. 567, 578–80 (1996).

that was available in the suburbs.⁶¹ As specialized jobs increasingly migrated to suburban areas, the entry-level requirements began to necessitate a higher degree of skilled professionalism. Many of the inner-city residents did not have post-secondary schooling to qualify for these jobs and thus were left out of this labor market.⁶² Consequently, the concentration of specialized jobs in the suburbs and nonspecialized jobs in inner cities resulted in a surplus of more workers than jobs available in inner cities.⁶³

B. Federal Policy and the Racialization of Suburban Access

Minorities remaining in inner cities were often deprived of essential resources, such as vehicle ownership and accessible public transit, which hindered their ability to commute to emerging job opportunities in suburban areas.⁶⁴ Additionally, transit systems were limited to inner-city areas and were not extended to suburban regions, effectively confining minorities to the inner-city.⁶⁵ In the suburbs, the new suburbanites established exclusionary practices that created barriers to entry for minority populations. Racial covenants identified as the Jim Crow rules were frequently used to bar the sale or occupancy of the new housing units to the minority, non-White population.⁶⁶ However, these covenants were ruled unenforceable after the U.S. Supreme Court deemed them unconstitutional in the *Shelley v. Kraemer* case.⁶⁷ Notably, while these covenants were deemed unenforceable, they continued to be used.⁶⁸

In an earlier case, the U.S. Supreme Court ruling in *Village of Euclid v. Ambler Realty Co.* established that apartments could be considered a nuisance and viewed as an invasion.⁶⁹ This perception of invasion, associated with the introduction of individuals from lower social backgrounds, led to restrictions on apartments in most single-family home zones, significantly impeding the ability of

⁶¹ WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (2d ed. 1990); THOMAS J. SUGRUE, *THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT* 127–29, 132–43 (1996); Rory Fabian, *Ford Engine Plant*, CLEV. HIST. (Jan. 11, 2025), <https://clevelandhistorical.org/items/show/268> [https://perma.cc/M4ZM-FBDY].

⁶² Ihlanfeldt, *supra* note 59, at 222.

⁶³ Evelyn Blumenberg & Michael Manville, *Beyond the Spatial Mismatch: Welfare Recipients and Transportation Policy*, 19 J. PLAN. LIT. 182, 183–84 (2004).

⁶⁴ *Id.* at 183, 186.

⁶⁵ See Christof Spieler, *Racism Has Shaped Public Transit, and It's Riddled with Inequities*, RICE UNIV. (Aug. 24, 2020), <https://kinder.rice.edu/urbanedge/racism-has-shaped-public-transit-and-its-riddled-inequities#:~:text=It%27s%20a%20transit%20planning%20and,a%20bus%20in%20mixed%20tr> affic [https://perma.cc/V69V-5XX7].

⁶⁶ John A. Powell, *Structural Racism and Spatial Jim Crow*, *THE BLACK METROPOLIS IN THE TWENTY-FIRST CENTURY: RACE, POWER, AND POLITICS OF PLACE* 41, 44–45, 50–51 (Robert D. Bullard ed., Rowman & Littlefield Publishers Inc. 2007); Andrew H. Whittemore, *Exclusionary Zoning: Origins, Open Suburbs, and Contemporary Debates*, 87 J. AM. PLAN. ASS'N 167, 168 (2021).

⁶⁷ *Shelley v. Kraemer*, 334 U.S. 1 (1948).

⁶⁸ Leah Platt Boustan, *Racial Residential Segregation in American Cities* (Nat'l Bureau of Econ. Resch., Working Paper No. 19045, 2013); RICHARD R.W. BROOKS & CAROL M. ROSE, *SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAWS, AND SOCIAL NORMS* 72 (2013).

⁶⁹ *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

low-income minorities to move into suburban areas.⁷⁰ The suburbanites also utilized what was referred to as collective action, which included violence and arson against the minority families who moved into the white dominated areas.⁷¹ On the other hand, the FHA and HOLC explicitly recommended homogeneity in social grouping, specifically by race, as part of their underwriting standards, thereby withholding mortgage securities from minorities who intended to move to the suburbs.⁷² Homeowners could also use race as a factor to explicitly refuse to sell or rent to minority households, a practice that continued until its prohibition by the Fair Housing Act of 1968.⁷³

The public housing program instituted through the U.S. Housing Act of 1937 further entrenched segregation as it concentrated the new public housing within the inner cities.⁷⁴ This practice further curtailed the movement of low-income minorities to the suburbs and continued for over three decades until it was prohibited by the 1968 Fair Housing Act and *Shannon v. United States Department of Housing and Urban Development*.⁷⁵ These practices devastated inner cities by triggering widespread disinvestment. As redlining excluded minority neighborhoods from banks' support, property values fell, wealthier residents left, and tax revenues declined, leading to deteriorating public services. When minorities attempted to move into better resourced areas, Jim Crow laws often blocked them. Even when legal victories, such as school desegregation lawsuits, allowed access, white residents responded by relocating again, creating new segregated neighborhoods.⁷⁶

C. Unequal Access: The Hidden Costs of Suburban Inaccessibility

These patterns of disinvestment and exclusion laid the groundwork for a broader structural issue in urban America: spatial mismatch. Originally formulated by John Kain in 1968, spatial mismatch refers to the phenomenon where the decentralization of jobs from urban centers to suburban peripheries disproportionately affected minority communities confined to inner cities.⁷⁷ As employment opportunities moved outward, Black workers were physically separated from jobs, with inadequate public transportation compounding the barrier. The long distances to the suburbs made commuting costly, while limited information on job

⁷⁰ See Whittemore, *supra* note 66.

⁷¹ Boustán, *supra* note 68.

⁷² Powell, *supra* note 66.

⁷³ Boustán, *supra* note 68, at 9.

⁷⁴ See LAMBERG, *supra* note 53, at 7, 9; Kirk McClure, Anne R. Williamson, Hye-Sung Han & Brandon Weiss, *The LIHTC Program, Racially/Ethnically Concentrated Areas of Poverty, and High-Opportunity Neighborhoods*, 6 TEX. A&M J. PROP. L. 89, 91 (2020); Terry Gross & Richard Rothstein, *Historian Says Don't 'Sanitize' How Our Government Created Ghettos*, NPR (May 14, 2015, 3:16 PM), <https://www.npr.org/transcripts/406699264> [<https://perma.cc/U5B5-CZUM>].

⁷⁵ See *Shannon v. U.S. Dep't Hous. Urb. Dev.*, 436 F.2d. 809, 821–22 (1970); Philip D. Tegeler, *The Persistence of Segregation in Government Housing Programs*, in *THE GEOGRAPHY OF OPPORTUNITY* 196, 197 (2006); Fair Housing Act, 42 U.S.C. §§ 3601–19 (1968).

⁷⁶ Powell, *supra* note 66, at 44.

⁷⁷ Ihlanfeldt, *supra* note 59, at 220.

opportunities for minorities further exacerbated this challenge.⁷⁸ The result of this disparity was the concentration of poverty due to modal and skill mismatches, making employment inaccessible to residents without a car in areas characterized by auto-oriented land-use patterns.⁷⁹ Due to this concentration of poverty, residents often lacked social networks with peers who were connected to other labor sources.⁸⁰

Galster and Killen further expanded the spatial mismatch concept by elaborating on “process” and “prospects,” the former referring to the institutional systems that facilitate upward mobility and the latter to individuals’ perceptions of opportunities.⁸¹ Decades of discrimination had deeply eroded both, leaving many minority residents distrustful of systems that historically excluded them and skeptical of the opportunities supposedly available in the suburbs.⁸² The high unemployment and an oversupply of labor in inner cities drove down wages, resulting in a positively sloped intra-urban wage gradient for low-skilled workers, with higher wages found farther from the city center.⁸³ An analysis by Powell found that based on the trends at the time, it would take nearly 580 years for the wage gap to be closed.⁸⁴ Moreover, the unemployment rate was found to be twice as high as the rate in the suburbs.⁸⁵

This pattern of disinvestment and segregation also contributed to persistent disparities in food access for minority and low-income communities. Food deserts and food insecure areas are often characterized by the absence of nearby supermarkets, fresh food grocery stores, and flexible mobility, limiting access to affordable and nutritious food.⁸⁶ Research consistently shows that redlined neighborhoods, often predominantly African American and Hispanic communities, have fewer grocery stores, forcing residents to travel close to two miles farther to access fresh produce compared to those in predominantly White areas.⁸⁷ These disparities are worsened by retail redlining, where stores avoid low-income areas due to perceived lower profitability, especially on perishable goods.⁸⁸ As a result,

⁷⁸ *Id.* at 229.

⁷⁹ Blumenberg & Manville, *supra* note 63, at 186, 197; Fan, *supra* note 60, at 153.

⁸⁰ Boustan, *supra* note 68.

⁸¹ George C. Galster & Sean P. Killen, *The Geography of Metropolitan Opportunity: A Reconnaissance and Conceptual Framework*, 6 HOUS. POL'Y DEBATE 7, 9 (1995).

⁸² *See id.* at 35–36.

⁸³ Ihlanfeldt, *supra* note 59, at 221 (“The surplus of resident labor within black areas will result in the higher unemployment that Kain hypothesized if wage rates are inflexible in a downward direction. If wages are flexible, however, the labor surplus will be eliminated as wage rates fall to their equilibrium level. ... Thus job decentralization combined with involuntary housing segregation may reduce the economic welfare of blacks by making it more difficult to find work, by reducing wage rates in black areas relative to white areas, or by increasing commuting costs.”).

⁸⁴ Powell, *supra* note 66, at 42.

⁸⁵ *See id.*

⁸⁶ James D. Wright, Amy M. Donley, Marie C. Gualtieri & Sara M. Strickhouser, *Food Deserts: What is the Problem? What is the Solution?*, 53 SOC. SCI. & PUB. POL'Y 171, 171 (2016); Mengyao Zhang & Debarchana Ghosh, *Spatial Supermarket Redlining and Neighborhood Vulnerability: A Case Study of Hartford, Connecticut*, 20 TRANSACTIONS IN GIS 79, 81 (2016).

⁸⁷ Shannon N. Zenk, Amy J. Shulz, Teretha Hollis-Neely, Richard T. Campbell, Nellie Holmes, Gloria Watkins, Robin Nwankwo & Angela Odoms-Young, *Fruit and Vegetable Intake in African Americans: Income and Store Characteristics*, 29 AM. J. PREVENTATIVE MED. 1, 3 (2005); Yasamin Shaker, Sara E. Grinesky, Timothy W. Collins & Aaron B. Flores, *Redlining, Racism, and Food Access in US Urban Cores*, 40 AGRIC. & HUM. VALUES 101, 108 (2023).

⁸⁸ Zhang & Ghosh, *supra* note 86, at 79–82.

local corner stores and independent grocers, which offer fewer nutrient-dense options, become the primary sources of food, contributing to poor diets, obesity prevalence, and negative health outcomes.⁸⁹ The convenience of one-stop shopping and big box stores in wealthier areas remains out of reach, and while car ownership alleviates some challenges, minority residents have disproportionately lower vehicle ownership rates and face hardships regarding transit access.⁹⁰

Studies have also shown that economically disadvantaged neighborhoods consistently face a shortage of healthcare providers and facilities, limiting residents' ability to access timely and quality care.⁹¹ The disparities are compounded by inadequate community amenities, including limited transportation, low-performing schools, and a lack of commercial investment, which deter healthcare facilities and physicians from locating in these neighborhoods.⁹² The non-specialized jobs available to low-income, non-skilled workers often do not offer the comprehensive health insurance coverage typically provided by firms located in suburban areas, which is often more extensive than public insurance.⁹³ Subsequently, redlined areas correlate with higher rates of chronic illnesses, advanced-stage diagnoses, and lower rates of surgical intervention due to delayed care and under-resourced facilities.⁹⁴ A recent study by Suncica Milosevic and Ajla Aksamija further found that even during the COVID-19 pandemic, vaccination rates were significantly lower in redlined areas due to proximity and transportation challenges, despite federal measures increasing their availability.⁹⁵ Meanwhile, another study found that the presence of at least one Federally Qualified Health Center (FQHC) in a redlined medically underserved area significantly increases the likelihood of patients in that area seeking healthcare services at FQHCs.⁹⁶

⁸⁹ Renee E. Walker, Jason Block & Ichiro Kawachi, *Do Residents of Food Deserts Express Different Food Buying Preferences Compared to Residents of Food Oases? A Mixed-Methods Analysis*, 9 INT'L J. BEHAV. NUTRITION & PHYSICAL ACTIVITY 1, 2 (2012); Zenk et al., *supra* note 87, at 6.

⁹⁰ Fan, *supra* note 60, at 158.

⁹¹ See, e.g., Darrell J. Gaskin, Gniesha Y. Dinwiddie, Kitty S. Chan & Rachael McCleary, *Residential Segregation and Disparities in Health Care Services Utilization*, 69 MED. CARE RSCH. & REV. 158, 162 (2012).

⁹² *Id.* at 161–62; Darrell J. Gaskin, Gniesha Y. Dinwiddie, Kitty S. Chan & Rachael R. McCleary, *Residential Segregation and the Availability of Primary Care Physicians*, 47 HEALTH SERVS. RSCH. 2353, 2356 (2012).

⁹³ Julia A. Prentice, *Neighborhood Effects on Primary Care Access in Los Angeles*, 62 SOC. SCI. & MED. 1291, 1293 (2006).

⁹⁴ Odysseas P. Chatzipanagiotou, Selamawit Woldesenbet, Muhammad Musaab Munir, Giovanni Catalano Mujtaba Khalil, Zayed Rashid, Abdullah Altaf & Timothy M. Pawlik, *Impact of Contemporary Redlining on Healthcare Disparities Among Patients with Gastrointestinal Cancer: A Mediation Analysis*, 32 ANNALS SURGICAL ONCOLOGY 1199, 1207 (2024).

⁹⁵ Suncica Milosevic & Ajla Aksamija, *Vaccination Accessibility Analysis: Modeling Historical Patterns of Redlining and Access to Healthcare Services*, 2023 SOC'Y MODELING & SIMULATION INT'L 448, 455 (2023).

⁹⁶ Eun Kyung Lee, Gwendolyn Donley, Timothy H. Ciesielski, Darcy A. Freedman & Megan B. Cole, *Spatial Availability of Federally Qualified Health Centers and Disparities in Health Services Utilization in Medically Underserved Areas*, 328 SOC. SCI. & MED. 1, 4 (2023).

D. Outcomes of Suburbanization

The cumulative impact of this spatial inequality continues to manifest in deeply entrenched socioeconomic and health disparities. Contemporary analysis reveals that neighborhoods historically designated as hazardous by HOLC exhibit the highest levels of poverty, limited public and private investments, low vehicle ownership rates, unemployment, and social vulnerability.⁹⁷ These areas have significantly lower rates of homeownership, home values, economic mobility, and wealth accumulation, with the racial wealth gap between Black and White Americans reaching a historic high of \$242,000 in 2022.⁹⁸ The U.S., with the highest income inequality among developed nations,⁹⁹ shows an unusually strong persistence of poverty and wealth across generations, diverging from the typical pattern where inequality leads to increased redistributive policies.¹⁰⁰ The consequences of inequitable transit infrastructure extend beyond economic opportunity. As seen during Hurricane Katrina, the city's lack of effective evacuation plans for transit users disproportionately endangered Black residents, whose reliance on public transit was four times higher than that of white residents.¹⁰¹

With social determinants responsible for as much as seventy-five percent of an individual's vulnerability to disease, residential segregation emerges as a powerful driver of health disparities.¹⁰² As a result, communities in historically segregated areas face a disproportionate burden of chronic illnesses, higher rates of poor birth outcomes, and increased risk of premature death.¹⁰³ Children in these neighborhoods face higher mortality rates, poorer educational attainment, and restricted upward mobility, reinforcing intergenerational cycles of disadvantage.¹⁰⁴ In states with high inequality, the stress of relative deprivation correlated with poor

⁹⁷ See BROOKS & ROSE, *supra* note 68, at 207; Chatzipanagiotou et al., *supra* note 94, at 1206; Yujian Lu, Natasha Howard, Christopher P. Brown & Xi Gong, *The Long-Run Effect of Historical Redlining Practices on Social Vulnerability in U.S. Cities*, 157 CITIES 1, 1–3, 6 (2025); Carolyn B. Swope, Diana Hernández & Lara J. Cushing, *The Relationship of Historical Redlining with Present-Day Neighborhood Environmental and Health Outcomes: A Scoping Review and Conceptual Model*, 99 J. URB. HEALTH 959, 976 (2022); Bev Wilson, *Urban Heat Management and the Legacy of Redlining*, 86 J. AM. PLAN. ASS'N 443, 446 (2020).

⁹⁸ Ana Hernández Kent & Lowell R. Ricketts, *U.S. Wealth Inequality: Gaps Remain Despite Widespread Wealth Gains*, FED. RESERV. BANK ST. LOUIS (Feb. 7, 2024), <https://www.stlouisfed.org/open-vault/2024/feb/us-wealth-inequality-widespread-gains-gaps-remain#authorbox> [<https://perma.cc/ZF2P-2RFM>].

⁹⁹ Kathryn M. Neckerman & Florencia Torche, *Inequality: Causes and Consequences*, 33 ANN. REV. SOCIO. 335, 336 (2007).

¹⁰⁰ *Id.* at 345.

¹⁰¹ Manuel Pastor, Robert Bullard, James K. Boyce, Alice Fothergill, Rachel Morello-Frosch & Beverly Wright, *Environment, Disaster, and Race After Katrina*, 13 RACE, POVERTY & ENV'T 21, 21 (2006).

¹⁰² Gaskin et al., *supra* note 91, at 162.

¹⁰³ Chatzipanagiotou et al., *supra* note 94, at 1200; Elizabeth Friedman, Brian Lee, Casey Kalman & Neal Wilson, *Historic Racism in Kansas City Affects Today's Pediatric Asthma Burden*, 78 HEALTH & PLACE 1, 1 (2022); Noa T. Kraus, Sarah Connor & Krista Shoda, *Historic Redlining and Health Outcomes: A Systematic Review*, 41 PUB. HEALTH NURSING 287, 287 (2024); Aparna Lhila & Kosali I. Simon, *Relative Deprivation and Child Health in the USA*, 71 SOC. SCI. & MED. 777, 777 (2010).

¹⁰⁴ Neckerman & Torche, *supra* note 99, at 337–45, 349–51; see generally Powell, *supra* note 66.

health behaviors, increased mortality, and mental distress.¹⁰⁵ Additionally, redlined areas tend to be situated downwind and near polluting facilities, such as coal and oil power plants, which increase environmental health risks and contribute to higher rates of asthma, cardiovascular disease, and cancer.¹⁰⁶

These outcomes are not accidental but rather the product of deliberate policy choices that extracted resources from urban cores and redirected them toward suburban development without reinvestment, leaving marginalized communities to bear the consequences of structural neglect.¹⁰⁷

E. The Impact of Mobility

The internal combustion engine revolutionized American urban form, as Jackson observed, but this transformation left those without access to automobiles behind. The expansion of the interstate highway system, funded through public taxes, prioritized suburban car travel while neglecting investments in inner-city public transit, such as streetcars.¹⁰⁸ This omission disadvantaged low-income, transit-dependent residents, who contribute to highway funding but rarely benefit from it.¹⁰⁹ For nearly four decades, discriminatory planning practices and redlining entrenched these disparities, and even after the Civil Rights Act of 1964, the resulting damage was woven into the urban fabric.

Mobility remains central to overcoming these persistent inequalities, yet transportation policies, both past and present, often reinforce them.¹¹⁰ Research consistently identifies transportation as a major barrier to employment for low-income individuals and welfare recipients.¹¹¹ Powell notes that while seventy percent of new jobs are located in the suburbs, forty percent are inaccessible by

¹⁰⁵ Lhila & Simon, *supra* note 103, at 777–78.

¹⁰⁶ Lara J. Cushing, Shiwen Li, Benjamin B. Steiger & Joan A. Casey, *Historical Red-Lining is Associated with Fossil Fuel Power Plant Siting and Present-Day Inequalities in Air Pollutant Emissions*, 8 NATURE ENERGY 52, 52–53 (2023).

¹⁰⁷ Jackelyn Hwang, Michael Hankinson & Kreg Steven Brown, *Segregation and Subprime Lending within and across Metropolitan Areas*, 93 SOCIAL FORCES 1081, 1100 (2015); Gross & Rothstein, *supra* note 74; see generally Powell, *supra* note 66.

¹⁰⁸ Kenneth T. Jackson, *Federal Subsidy and the Suburban Dream: How Washington Changed the American Housing Market*, in CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 191, 191 (1985); Jonathan Kwitny, *The Great Transportation Conspiracy*, in CONTROLLING TECHNOLOGY: CONTEMPORARY ISSUES 265–274 (Eric Katz, Andrew Light & William B. Thompson 2d ed. 1991).

¹⁰⁹ Powell, *supra* note 66, at 51.

¹¹⁰ Nancy Hudspeth & Gerard Wellman, *Equity and Public Finance Issues in the State Subsidy of Public Transit*, 30 J. PUB. BUDGETING ACCT. & FIN. MGMT. 135, 149 (2018); Christof Spieler, *Racism Has Shaped Public Transit, and It's Riddled with Inequities*, RICE UNIV. (Aug. 24, 2020), <https://kinder.rice.edu/urbanedge/racism-has-shaped-public-transit-and-its-riddled-inequities> [<https://perma.cc/EFC8-ASQ3>]; Taylor & Morris, *supra* note 25, at 352.

¹¹¹ Blumenberg & Agrawal, *supra* note 1, at 183; Rolf Pendall, Evelyn Blumenberg & Casey Dawkins, *What if Cities Combined Car-Based Solutions with Transit to Improve Access to Opportunity?*, METRO. HOUS. & CMTYS. POL'Y CTR. 1, 181 (2016).

public transit.¹¹² This mismatch is especially severe for low-income workers, who are more likely to work non-standard hours, during which transit service is limited or nonexistent.¹¹³ Even when available, transit options are frequently unreliable, time-consuming, or unaffordable.¹¹⁴

Investment in public transit offers a compelling solution to these challenges. By reducing the cost and commuting time between inner cities and suburban job centers, transit increases access not just to employment but also to healthcare, retail, and other essential services.¹¹⁵ Compared to housing integration, which is often costlier and politically contentious, transit expansion is a more viable strategy for addressing the spatial inequality.¹¹⁶ Moreover, when designed inclusively, public transit can support both equity, by prioritizing the needs of marginalized groups, and equality, by expanding universal access. As Schattschneider argues, policy momentum builds when broad coalitions support a cause, making universal public transit not just necessary but also politically strategic.¹¹⁷

V. FARE-FREE TRANSIT AS A SOLUTION

Public transit fares can impose a significant financial burden on many individuals and households, potentially limiting their access to essential services, employment, and educational opportunities. In response, a growing number of municipalities worldwide have experimented with implementing fare-free transit policies. This Part explores the impact of transit fares and documented impacts of these fare-free policies by examining the diverse outcomes observed in cities that have eliminated fares.

A. The Impact of Transit Fares

Access to efficient transit service can play a critical role in addressing mobility and accessibility challenges faced by under-resourced households.¹¹⁸ By connecting individuals to essential destinations, resources, and services, transit can

¹¹² Blumenberg & Manville, *supra* note 63, at 191.

¹¹³ Fan, *supra* note 60, at 153.

¹¹⁴ Shirshendu Chakrabarti, *How Can Public Transit Get People Out of Their Cars? An Analysis of Transit Mode Choice for Commute Trips in Los Angeles*, 54 TRANSP. POL'Y 80, 87 (2017); Mario Cools, Yannick Fabbro & Tom Bellemans, *Free Public Transport: A Socio-Cognitive Analysis*, 86 TRANSP. RES. PART A: POLICY & PRAC. 96, 97 (2016).

¹¹⁵ Nancy Hudspeth & Gerard Wellman, *Equity and Public Finance Issues in the State Subsidy of Public Transit*, 30 J. PUB. BUDGETING, ACCT. & FIN. MGMT. 135, 136 (2018); *see* TODD LITMAN, VICT. TRANSP. POL'Y INST., EVALUATING PUBLIC TRANSIT BENEFITS AND COSTS 65, 70–74 (May 22, 2025).

¹¹⁶ Fan, *supra* note 60, at 153.

¹¹⁷ E.E. SCHATTSCHNEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA* 1–19 (Holt, Rinehart & Winston 1960).

¹¹⁸ Timothy F. Welch, *Equity in Transport: The Distribution of Transit Access and Connectivity Among Affordable Housing Units*, 30 TRANSP. POL'Y 283, 283 (2013).

significantly enhance their quality of life.¹¹⁹ For example, improved access to such elements has been linked to heightened probabilities of employment and better health outcomes.¹²⁰ However, this impact of transit can be muted due to the presence of barriers that discourage its use. Possible barriers are plentiful and can include psychological concerns (e.g., perceived safety), physical obstacles (e.g., steep gradients, inaccessible design), inadequate facilities (e.g., lack of shelters or seating), and insufficient travel information.¹²¹

A prominent barrier that is frequently mentioned by transit users is fare affordability.¹²² This barrier is pronounced for low-income users as transit fares can consume a large share of their income.¹²³ In some metropolitan areas, low-income households spend as much on transportation as they do on housing.¹²⁴ To cope, users often reduce spending or alter travel behavior to cover transit costs.¹²⁵ This can result in a reduction in the consumption of necessities such as food or medication or the elimination and reduction of trips.¹²⁶ The reduction or elimination of trips ultimately limits the level of access users have to resources and opportunities located throughout the region. This behavior has been found to contribute to negative outcomes such as missed medical appointments and school absences, with broader social and health implications.¹²⁷ This can contribute towards the deterioration in quality of life and increase the risk of social exclusion, which occurs when someone isn't able to participate in the social, economic, and political aspects of everyday life due to having limited access to varying opportunities.¹²⁸

The elimination of fares is considered as a way in which to help address such issues. By delivering fare-free transit service, transit becomes more accessible,

¹¹⁹ Lubitow et al., *supra* note 3, at 926; Thomas W. Sanchez, *The Connection Between Public Transit and Employment: The Cases of Portland and Atlanta*, 65 J. AM. PLAN. ASS'N 284, 292 (1999); C. Yi, *Impact of Public Transit on Employment Status: Disaggregate Analysis of Houston, Texas*, 1986 TRANSP. RES. REC. 137, 143 (2006); ZHAO & GUSTAFSON, *supra* note 4, at 73.

¹²⁰ Kevin Credit, Gustavo Dias & Brenda Li, *Exploring Neighbourhood-Level Mobility Inequity in Chicago Using Dynamic Transportation Mode Choice Profiles*, 12 TRANSP. RES. INTERDISCIPLINARY PERSP. 1, 1–2, 11 (2021).

¹²¹ Andrew Church, Martin Frost & Karen Sullivan, *Transport and Social Exclusion in London*, 7 TRANSP. POL'Y 195, 198–200 (2000); Lucas, *supra* note 1, at 107–08; Mackett & Thoreau, *supra* note 3, at 611.

¹²² Blumenberg & Agrawal, *supra* note 1, at 369; Lubitow et al., *supra* note 3, at 924.

¹²³ Genevieve Giuliano, *Low Income, Public Transport, and Mobility*, 1927 TRANS. RES. REC.: J. TRANSP. RES. BD. 63, 63–70 (2005); Thomas W. Sanchez, Rich Stolz & Jacinta S. Ma, *Inequitable Effects of Transportation Policies on Minorities*, 1885 TRANSP. RSCH. REC.: J. TRANSP. RSCH. BD. 104, 105 (2004).

¹²⁴ Sanchez et al., *supra* note 123 at 105.

¹²⁵ Blumenberg & Agrawal, *supra* note 1, at 369–70; see Alexis F. Perrotta, *Transit Fare Affordability: Findings From a Qualitative Study*, 22 PUB. WORKS MGMT. & POL'Y 226, 245 (2017).

¹²⁶ Blumenberg & Agrawal, *supra* note 1, at 368; see Perrotta, *supra* note 125, at 232.

¹²⁷ See Lubitow et al., *supra* note 3, at 929–30.

¹²⁸ Kenyon et al., *supra* note 3, at 209.

and users can experience considerable improvements in their personal mobility.¹²⁹ They also gain greater access to the essential resources which are dispersed throughout the region they inhabit.¹³⁰ This impact is likely to be heightened for those who have historically suffered from limited mobility and limited access to opportunities, low-income residents and people of color.

B. Fare-Free Transit in Practice

In recent years, fare-free public transit has gained traction among service providers in the United States. The motivation behind exploring or implementing such policies is multifaceted. One factor is a desire to enhance equity, as eliminating fares removes a significant barrier towards use for low-income and transportation-disadvantaged populations, thereby improving their access to jobs, education, healthcare, and other essential services.¹³¹ Another key motivation is to increase ridership.¹³² By making transit more accessible, service providers hope to draw new riders, potentially encouraging a shift away from personal vehicles. This shift further supports the attainment of environmental goals held by the service provider, such as the reduction of traffic congestion, the lowering of greenhouse gas emissions, and the improvement of air quality.¹³³ Providers also pursue fare-free transit to gain operational efficiencies. Removing the need for fare collection can significantly speed up the boarding process, reduce vehicle dwell times at stops, and improve on-time performance.¹³⁴ These outcomes can aid in the reduction of operating costs while enhancing overall system performance.¹³⁵

The impact fare-free transit can have on users' mobility is evident when looking at cases that have implemented this policy. Cases spanning Aubagne, France; Hasselt, Belgium; Tallinn, Estonia; Corvallis, Oregon; Asheville, North Carolina; Denver, Colorado; and Mercer County, New Jersey, all share one common outcome: the observed increase in ridership following the elimination of transit fares.¹³⁶ If fares are eliminated, we see an increase in the number of transit trips

¹²⁹ See Jiangping Zhou, Min Zhang & Pengyu Zhu, *The Equity and Spatial Implications of Transit Fare*, 121 TRANSP. RSCH. PART A: POL'Y & PRAC. 309, 313 (2019).

¹³⁰ See *id.*

¹³¹ Keblowski, *supra* note 9, at 2816–17.

¹³² *Id.* at 2821.

¹³³ VOLINSKI, *supra* note 10, at 22, 70, 94–95.

¹³⁴ *Id.* at 2, 24, 33.

¹³⁵ Furthermore, in situations where farebox recovery ratios (the proportion of operating costs covered by fare revenue) are already very low, the agency might determine that the administrative costs associated with fare collection and enforcement outweigh the revenue generated, making fare elimination a financially pragmatic choice, particularly if stable alternative funding sources can be secured. *Id.* at 24 (“Fare-free transit allows passengers to board from both doors, helping to speed the boarding process and reduce dwell time, thus allowing the bus to stay on schedule more reliably. One transit manager reported that dual-door boarding has allowed them to reduce the rate of acquiring additional equipment to remain on schedule, thereby minimizing the increase in capital and operating expenses caused by buying and utilizing additional equipment.”).

¹³⁶ See Ralf Brand, *Co-Evolution of Technical and Social Change in Action: Hasselt's Approach to Urban Mobility*, 34 BUILT ENV'T 182, 189–90 (2008); Oded Cats, Yusak O. Susilo & Triin Reimal, *The Prospects of Fare-Free Public Transport: Evidence from Tallinn*, 44 TRANSP. 1083, 1100–01 (2016); Lawrence B. Doxsey & Bruce D. Spear, *Free-Fare Transit: Some Empirical Findings*, 799

taken. This impact can be heightened for populations that traditionally suffer from limited mobility. For example, the elimination of transit fares in Tallin, Estonia resulted in higher share of transit usage among adolescents (+ 21%), the elderly (+ 18%), the poor (+ 26%), and unemployed (+ 32%).¹³⁷ Similar observations have been made in the United States,¹³⁸ France,¹³⁹ and South Korea.¹⁴⁰

Observed outcomes in practice support the notion that the implementation of a fare-free transit policy can result in heightened transit use.¹⁴¹ This can be transformative for many, especially for those whose access to transit and personal mobility has been previously limited. Without the worry of fare affordability, individuals with limited financial resources can travel more frequently and flexibly, improving the level of access they have to vital resources and services. This can result in a drastic improvement in their quality of life via improved access to employment, education, childcare, medical care, social networks, and other essential resources. Benefits that emerge from heightened transit use are not likely to be exclusively experienced by transit users. For instance, heightened transit use can lead to reduced congestion and improved air quality, which will benefit the community broadly.¹⁴²

VI. POLICY AND LEGAL FRAMEWORKS SHAPING FARE-FREE TRANSIT

The transition towards fare-free public transit represents a significant policy shift, and its feasibility and implementation are profoundly influenced by the existing policy and legal landscape. Thus, the extent to which regulatory environments at various governmental levels hinder or support the adoption of fare-free policies needs to be evaluated. Foundational to this discussion is an exploration of the ongoing debate concerning whether public transit should fundamentally be considered a public good, as perspectives on this issue often shape legislative and funding priorities.

TRANSP. RSCH. REC. 47, 47–48 (1981); A.H. Studenmund & David Connor, *The Free-Fare Transit Experiments*, 16 TRANSP. RSCH. PART A: POL'Y & PRAC. 261, 262–64 (1982); VOLINSKI, *supra* note 10, at 2, 10.

¹³⁷ See Cats et al., *supra* note 136, at 1095–96.

¹³⁸ See VOLINSKI, *supra* note 10, at 2, 13.

¹³⁹ See HENRI BRICHE, DUNKERQUE “LABORATOIRE” DE LA GRATUITÉ DES TRANSPORTS EN COMMUN: RETOUR SUR LES EFFETS DE LA GRATUITÉ PARTIELLE [DUNKIRK “LABORATORY” FOR FREE PUBLIC TRANSPORT: EFFECTS OF PARTIALLY FREE-OF-CHARGE ACCESS] 53 (Observatoire des Villes du Transport Gratuit [OVTG] 2017) (Fr.), https://www.wizodo.fr/photos_contenu/doc-30c5db6b346b71643bfcdebd5a9e083b.pdf [<https://perma.cc/YV2M-STWY>].

¹⁴⁰ See Jun Myung-Jin, Jeong Ji-Eun & An Hyun-Ju, *The Welfare Effects of the Free Subway Fare Scheme for Seniors: A Discrete Choice Approach with the Case of Seoul*, 6 CASE STUD. ON TRANSP. POL'Y 642, 650 (2018).

¹⁴¹ VOLINSKI, *supra* note 10, at 26 (“The effect of fare-free policies on total public transit ridership is invariably positive, many times at levels unanticipated even by the most optimistic transit managers or policymakers.”).

¹⁴² Cats et al., *supra* note 136, at 1086.

A. Transit as a Public Good

Fare-free transit is not a novel ideal. It has been the focus of public debate for some time, supported by the notion that public goods should be “free.”¹⁴³ Whether transit should actually be considered a public good is a topic of discussion itself. From an economic standpoint, a pure public good needs to be non-rivalrous, which means that one person’s consumption of the good does not diminish another person’s ability to consume it, and non-excludable, meaning that it is impossible or prohibitively expensive to prevent people who haven’t paid for the good from consuming it.¹⁴⁴ While public transit does not meet these criteria, as heightened demand can restrict others from consuming transit service and transit service providers actively prevent non-payers from using the system via fare evasion techniques, it should be classified as a public good given the benefits it yields to society as a whole.¹⁴⁵ While the ability of public transit to meet the criteria typical of public goods can be contested, the nature of the benefits it yields cannot.¹⁴⁶

The benefits produced by public transit can be widely applied across entities and individuals within the regions where service is delivered.¹⁴⁷ For example, businesses benefit from the presence of transit through enhanced access to a potential workforce and the production of reliable commute options for employees.¹⁴⁸ Transit can support downtown development by reducing parking costs and traffic congestion, enabling denser, more walkable commercial areas. Additionally, reducing congestion benefits manufacturing and shipping firms that depend on efficient roadway use.¹⁴⁹ Taxpayers and local governments benefit from transit as it can ensure access to vital public services like healthcare and education, particularly for disadvantaged populations.¹⁵⁰ It also aids strategic land use planning, potentially reducing infrastructure costs associated with sprawl while supporting economic development efforts that can broaden the tax base.¹⁵¹ Even motorists who do not use public transit are likely to experience considerable benefits due to the presence of this service.¹⁵² Benefits are primarily tied to reduced traffic and parking congestion, as transit options attract other travelers off the roadways.¹⁵³ Congestion relief supported by transit service has the added benefit of creating a safer driving

¹⁴³ *Id.*

¹⁴⁴ Julian Reiss, *Public Goods*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY 1, 2 (Edward N. Zalta ed., 2021), <https://plato.stanford.edu/entries/public-goods/> [<https://perma.cc/8LZJ-SAQ3>].

¹⁴⁵ See Daniel Baldwin Hess, *Decrypting Fare-Free Public Transport in Tallinn, Estonia*, 5 CASE STUD. ON TRANSP. POL'Y 690, 691 (2017).

¹⁴⁶ See Rebecca Schein, *Free Transit and Social Movement Infrastructure: Assessing the Political Potential of Toronto’s Nascent Free Transit Campaign*, 22 ALTERNATE ROUTES: J. CRITICAL SOC. RSCH. 115, 121 (2011).

¹⁴⁷ See LITMAN, *supra* note 115, at 79.

¹⁴⁸ *Id.* at 76.

¹⁴⁹ *Id.*

¹⁵⁰ See *id.* at 28, 76.

¹⁵¹ *Id.* at 76.

¹⁵² See *id.* at 77.

¹⁵³ See *id.*

environment for remaining motorists.¹⁵⁴ Furthermore, transit also provides motorists with a valuable backup mobility option when they cannot drive.¹⁵⁵

While the benefits of transit are felt by many, the public transit system is primarily supported by few. Public transit is funded disproportionately by low and middle-income people; as such, transit fares effectively act as a regressive tax.¹⁵⁶ This gives heightened significance to the efforts that present public transit as a public good. If the benefits of public transit spill over to society beyond the direct users, as do schools and libraries, then should it be funded alike by governments through taxation? The fact that many regions throughout the United States employ transit fares tells us that transit is not yet considered in the same way as other services that produce considerable public benefit. The exploration of fare-free policies by many transit service providers may signal a changing perspective, which would be necessary for wide-ranging implementation.

B. Federal Policy and Legal Influences on Fare-Free Transit

Title VI, which was enacted as part of the Civil Rights Act of 1964, declares that:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.¹⁵⁷

This mandate directly applies to recipients of funding from the Federal Transit Administration (FTA), which distributes thousands of grants to state and local transit providers.¹⁵⁸ The FTA actively monitors these recipients' Title VI programs to ensure compliance,¹⁵⁹ possessing the authority to challenge the use of federal funds when local policies exhibit a disparate impact on communities of color. This enforcement mechanism is designed to prevent the perpetuation of past discriminatory practices, even through seemingly neutral policies.

Furthermore, Department of Justice (DOJ) regulations require that agencies like the Department of Transportation (DOT) issue guidelines detailing Title VI requirements for fund recipients.¹⁶⁰ The DOT's regulations echo the language of Title VI, obligating recipients to proactively ensure equitable access to their programs, regardless of race, color, or national origin. For instance, the Department of Transportation's Title VI regulations impose affirmative obligations, which

¹⁵⁴ See *id.*

¹⁵⁵ *Id.* at 76; Michael Manville & Adam Seth Levine, *What Motivates Public Support for Public Transit?*, 118 TRANSP. RSCH. PART A: POL'Y & PRAC. 567, 568 (2018).

¹⁵⁶ See Giuliano, *supra* note 123, at 64.

¹⁵⁷ 42 U.S.C. § 2000d.

¹⁵⁸ FED. TRANSIT ADMIN., U.S. DEP'T OF TRANSP., FTA C 4702.1B, TITLE VI REQUIREMENTS AND GUIDELINES FOR FEDERAL TRANSIT ADMINISTRATION RECIPIENTS (2012).

¹⁵⁹ *Id.* at VII-1.

¹⁶⁰ *Id.* at II-1-2.

include the duty to address and remedy the effects of past discriminatory practices where “prior discriminatory practice” existed.¹⁶¹

Given this legal framework, Title VI presents a theoretical avenue to advocate for fare-free transit policies in the United States. The obligation to remove or overcome the effects of discrimination where “prior discriminatory practice existed” offers a potential justification for addressing the long-term consequences of discriminatory federal policies that historically restricted access to suburban areas for marginalized communities. Implementing fare-free transit can be seen as a measure to rectify these past inequities by eliminating a significant barrier, transit fares, that disproportionately impacts individuals whose mobility and access to resources were previously limited.

The removal of transit fares has the added benefit of mitigating impact by removing the specific policy, fares, that research has found to disproportionately burden low-income individuals and, by extension, often racial and ethnic minorities.¹⁶² The fact that minorities are more likely to recognize fare affordability as a factor which limits or prevents their use of transit¹⁶³ is a representation of how transit fares can contribute to some protected classes being “*excluded from participation in, be denied the benefits of*” a program receiving federal financial assistance. In this context, Title VI can serve as a rationale for seriously considering fare-free policies as a means to ensure that one’s level of access and mobility is not contingent on the ability to pay, thereby promoting more equitable access to opportunities for all residents, in alignment with the spirit and requirements of Title VI.

However, relying on Title VI to advance fare-free transit policies faces significant limitations. One major hurdle is associated with the difficulty of judicial enforcement following the Supreme Court’s 2001 decision in *Alexander v. Sandoval*, a challenge to Alabama’s English-only driver’s license examination.¹⁶⁴ This ruling limited the implied private right of action under Title VI to cases of intentional discrimination, making it considerably harder for individuals and advocacy groups to challenge policies based solely on their disparate impact through private lawsuits.¹⁶⁵ As a result, the potential for Title VI to drive significant systemic change is more likely to originate from federal agencies rather than through grassroots or community led efforts. The Court’s ruling significantly limits the ability of the public to initiate change from the bottom up.

An additional hardship in relying on the use of Title VI to support efforts to implement fare-free transit policies is the necessity to counter a “substantial legitimate justification” argument.¹⁶⁶ This defense allows agencies to defend policies which may have a disparate impact if they can show it serves a legitimate purpose. In this sense, transit agencies are likely to argue that fares are essential for funding the operation and maintenance of transit systems. The case of *Darensburg*

¹⁶¹ 49 C.F.R. § 21.5(b)(7).

¹⁶² Zhou et al., *supra* note 129, at 309; Diego Da Silva, Willem Klumpenhouwer, Alex Karner, Mitchell Robinson, Rick Liu & Amer Shalaby, *Living On a Fare: Modeling and Quantifying the Effects of Fare Budgets on Transit Access and Equity*, 101 J. TRANSP. GEOGRAPHY 1, 5 (2022).

¹⁶³ Blumenberg & Agrawal, *supra* note 1, at 361, 369–70.

¹⁶⁴ *Alexander v. Sandoval*, 532 U.S. 275, 278–79 (2001).

¹⁶⁵ *Id.* at 285–86, 293.

¹⁶⁶ U.S. DEP’T TRANSP., *What Types of Discrimination are Prohibited by Title VI?*, <https://highways.dot.gov/media/34386> [<https://perma.cc/HH4V-DBJN>].

v. Metropolitan Transportation Commission exemplifies the power of this defense. In this case, low-income minority bus riders in the San Francisco Bay Area filed suit against the Metropolitan Transportation Commission (MTC), the agency responsible for regional transportation planning efforts.¹⁶⁷ The plaintiffs claimed that the MTC's funding decisions discriminated against minority transit users by prioritizing rail projects, which primarily served whiter, more affluent suburbs, over bus service, used more heavily by low-income people of color in urban areas.¹⁶⁸ This, they argued, violated Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment.¹⁶⁹ The use of a "substantial legitimate justification" argument played a role in the court's rationale for the outcome. The court found that MTC's investment in rail projects was supported by legitimate, non-discriminatory goals.¹⁷⁰ These goals included the enhancement of regional mobility, congestion relief, air quality improvement, and long-term transportation planning.¹⁷¹ These goals were considered rational and within the agency's discretion, even if the outcomes disproportionately benefited wealthier or whiter communities. This precedent underscores the difficulty in using Title VI to mandate fare-free policies when agencies can present seemingly valid financial and operational reasons for maintaining fares.

C. State Law as a Determinant of Fare-Free Transit Feasibility

A challenge that transit service providers are likely to face in the implementation of fare-free transit policies includes the need to replace what may be substantial farebox revenues with another revenue source.¹⁷² This reality underscores the critical importance of state-level government, which can significantly enable or hinder public transit service through its financial commitments and legislative frameworks.

A significant barrier to securing replacement funding often lies in state-level restrictions limiting the types of funds eligible for supporting public transit. Predominantly, these restrictions prohibit or limit the use of taxes and fees imposed on motorists, a major revenue stream traditionally used to support broader

¹⁶⁷ *Darensburg v. Metro. Transp. Comm'n*, 611 F. Supp. 2d 994 (No. C-05-01597 EDL) at 1054–55.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 518.

¹⁷⁰ However, on appeal, the Ninth Circuit Court of Appeals did not reach the issue of whether MTC had a substantial legitimate justification. Instead, the appellate court reversed the district court's finding of disparate impact, concluding that the plaintiffs' statistical measure for demonstrating disparate impact was unsound and their claim rested on a logical fallacy. *See generally* *Darensburg v. Metro. Transp. Comm'n*, 636 F.3d 511 (9th Cir. 2011). Therefore, while the "substantial legitimate justification" argument was central to the district court's decision, the appellate court's differing outcome meant it did not ultimately rely on that justification. Regardless of the appellate court's ruling on the specific disparate impact claim, the lower court's consideration of MTC's justifications highlights inherent difficulties in using Title VI to address discrimination concerns."

¹⁷¹ *Id.* at 1054.

¹⁷² VOLINSKI, *supra* note 10, at 2.

transportation systems. Taxes on motor fuel, in particular, represent a major funding source which provides support for a state's transportation network.¹⁷³ Yet, in numerous states, constitutional or statutory provisions explicitly forbid the allocation of state gas tax revenue toward public transit initiatives.

The nature of these restrictions carries significant weight. Gas tax limitations codified in state statutes are laws enacted and potentially repealed by state legislators. While challenging, advocating for statutory changes is a feasible legislative process. Currently, seven states impose such statutory restrictions.¹⁷⁴ Conversely, state constitutional restrictions present a far more formidable obstacle. Repealing or amending a constitutional provision typically requires a complex and politically challenging process, often involving statewide ballot measures or supermajority legislative votes. A total of twenty-six states are reported to have clauses in their state constitutions that prohibit or restrict the use of gas tax revenue for public transit.¹⁷⁵ An example is Minnesota which, within Article XIV of its constitution, mandates that motor vehicle fuel tax revenue be dedicated solely for highway purposes.¹⁷⁶ Restrictions on the use of gas tax for public transit use are also commonly coupled with limitations in the use vehicle registration fees, driver's license fees, and parking fees, which can exacerbate issues transit service providers face in identifying possible additional funding streams.

The restrictions on utilizing motorist-generated fees and taxes for transit often fail to acknowledge the tangible benefits that robust public transit systems provide to motorists themselves, such as reduced traffic congestion and wear on road infrastructure.¹⁷⁷ It also forces transit service providers to explore other local revenue generating mechanisms such as sales taxes which are likely to require a public vote and thus to be more difficult to enact.

Therefore, the specific legal and fiscal landscape established by state law is a major determinant of the feasibility of implementing fare-free transit policies. Restrictions on traditional transportation revenues force transit agencies to navigate complex local politics or devise innovative funding strategies. These alternative approaches might include alternatives such as the use of tax-increment financing zones or public-private partnerships, which are often context-dependent and may not be feasible or effective in all jurisdictions.

D. A Way Forward

To fully realize the promise of fare-free transit, a multi-faceted policy approach is needed, one that reimagines the role of transit in society, strengthens federal legal frameworks, aligns state-level fiscal policy, and builds upon the equity-

¹⁷³ Stephen Coleman Kenny, *Where Does Your State Stack Up on Supporting Transit*, TRANSP. FOR AM. (Feb. 22, 2023), <https://t4america.org/2023/02/22/transit-report-card-part-1/> [<https://perma.cc/25KA-3CNM>].

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ MINN. CONST., art. XIV, § 10 (1974); see *Highway Users Tax Distribution Fund for Local Roads and Bridges*, MINN. DEP'T OF TRANSP. (Jan. 2023), <https://www.lrl.mn.gov/docs/2024/other/240523.pdf> [<https://perma.cc/TWS3-N3GC>].

¹⁷⁷ LITMAN, *supra* note 115, at 79.

driven foundations of civil rights law. The following strategies outline key directions for moving forward:

1. Reframing Transit as a Public Good

One of the shifts necessary to support fare-free transit is a cultural and policy reorientation that treats public transportation not as a commodity, but as a public good.¹⁷⁸ This framing aligns transit with other essential services such as education, clean water, and emergency services.¹⁷⁹ These resources are made available based on collective need rather than individual ability to pay. Recognizing transit as a public good broadens the rationale for its public funding and justifies more robust and stable financial support. Such a shift requires federal and state policymakers to acknowledge the broader social, economic, and environmental benefits of transit.

2. Building on the Legacy of Title VI

Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin in programs receiving federal assistance,¹⁸⁰ yet its application to fare policies remains underdeveloped. To strengthen protections against inequitable fare structures, agencies such as the Federal Transit Administration (FTA) and the Department of Justice (DOJ) should issue formal guidance clarifying how Title VI applies to fare-setting practices. Such guidance should recognize fare burdens as a potential site of discriminatory impact and provide clear standards for conducting equity analyses.

3. Strengthening Federal Leadership and Support

To firmly embed support for equity-enhancing policies like fare-free transit, the federal government should build upon foundational environmental justice commitments, such as those initiated by Executive Order 12898, by enacting comprehensive legislation that codifies these principles into statutory authority.¹⁸¹ While EO 12898¹⁸² and subsequent orders like EO 14096¹⁸³ have been crucial in directing federal agencies to address disproportionate environmental and health impacts on minority and low-income populations, executive orders lack the permanence of statutes and remain vulnerable to change by future administrations. For example, both EO 12898 and EO 14096 were revoked on January 21, 2025, via

¹⁷⁸ Koblowski, *supra* note 9, at 2816.

¹⁷⁹ Cats et al., *supra* note 136, at 1086.

¹⁸⁰ 42 U.S.C. § 2000d.

¹⁸¹ Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 16, 1994).

¹⁸² *Id.*

¹⁸³ Exec. Order No. 14096, 88 Fed. Reg. 25251 (Apr. 21, 2023).

Executive Order 14173.¹⁸⁴ Codifying environmental justice principles would create a more durable legal framework and offer legal recourse for affected communities. Specific to public transportation, such a statute could incentivize fare-free policies in areas with environmental justice concerns. Therefore, transforming federal environmental justice directives from executive orders into statutory law offers a significantly more stable and powerful pathway for advancing and sustaining fare-free transit as a deliberate tool for transportation equity.

4. Enabling Revenue Flexibility Through State Legal Reform

At the state level, legal frameworks must evolve to support innovative and diversified funding mechanisms for transit. Restrictions on the use of traditional transportation revenues, such as gas taxes or vehicle registration fees, often limit agencies' ability to fund operations sustainably. States should reform their laws to permit transit providers to tap into a broader array of revenue sources. This flexibility acknowledges the multifaceted benefits that transit generates across sectors, from improved public health to increased economic productivity. Aligning state policy with this broader understanding of transit's value is essential to creating the financial conditions under which fare-free service becomes a possibility.

VII. CONCLUSION

This Note examines the ability of fare-free transit to address issues associated with limited mobility and access. It also explores the feasibility of implementing fare-free transit policies by examining current laws and policies. Ultimately, the potential benefits of fare-free transit are clear, yet the path to broad adoption across the U.S. remains obstructed by legal and policy realities. Existing frameworks at both federal and local levels are currently insufficient to support such a widespread shift. While the implications of eliminating fares are increasingly understood, realizing this policy nationwide requires significant groundwork. Until that foundational work progresses, communities must prioritize other viable strategies to tackle the immediate transportation barriers faced by their populations.

¹⁸⁴ Exec. Order No. 14173, 90 Fed. Reg. 8633 (Jan. 21, 2025).